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IN THE
SUPREME COURT OF THE UNITED STATES

ELEANOR TAFT TILTON, ET AL.,
Appellants,

v. No. 1555

ROBERT H. FINCH, ET AL
Appellees

Relevant Docket Entries

1968

September 25 - Verified Complaint, filed. Summons issued and together with copies of same and of complaint, handed to the Marshal for service.

September 25 - Request for 3-Judge Court, pursuant to 28 U.S.C. 2282 and 2284, filed by Plaintiffs.

October 15 - Designation of Judges, filed: "Having been notifed by the Honorable William H. Timbers, United States District Judge for the District of Connecticut, that an application has been filed in the above matter for relief pursuant to Title 28 United States Code Section 2284, I hereby designate the following judges, in addition to said Honorable William H. Timbers, to hear and determine said cause as provided by law: Honorable J. Joseph Smith, United States Circuit Judge, and Honorable M. Joseph Blumenfeld, United States District Judge for the District of Connecticut. IT IS HEREBY ORDERED that this order be filed in the above entitled cause in the United States District Court for the District of Connecticut. J. Edward Lumbard, Chief Judge, U.S. Court of Appeals for Second Circuit. M-10/15/68. Copies mailed to three Judges; copies mailed to all counsel of record.

November 25 - Answer of Defendants Sacred Heart University, Annhurst College, Fairfield University of Saint Robert Bellarmine, and Albertus Magnus College.

November 25 - Answer and Defenses, filed by Defendants Wilbur J. Cohen and Harold Howe 2d. Copies mailed to 3 Judges.

December 8 - Answer of Defendant, Marvin K. Peterson, filed.

1969

August 5 - Order entered that Robert H. Finch as Secretary of Health, Education and Welfare, and James E. Allen, Jr., as Commissioner of Education of the United States be substituted as parties defendant in place of Wilbur J. Cohen and Harold Howe II, their respective predecessors in office. Blumenfeld, J. M-8/5/69 Copies mailed all counsel. Copies to three judges.

November 3 - Motion for Leave to Amend Complaint, Notice of Motion and Affidavit, filed by Plaintiffs.

November 10 - Hearing on Motion for Leave to Amend Complaint. "No objection having been made by the defendants, the motion is granted." Blumenfeld, J. M-11/12/69. Copies mailed to all counsel.

November 13 - Amended Complaint, filed. Copies to 3 Judges.

December 2 - 3-Judge Court Commences. Jeffrey Axelrod admitted for this case for defendant U.S.A., on Motion of F. MacBuckley. Opening Statements: Leo Pfeffer 10:02 A.M.–10:43 A.M.; Mr. Axelrod 10:43 A.M. to 11:04 A.M.; Mr. Ahern 11:04 A.M. to 11:06 A.M.; Mr. Williams 11:06 A.M.–11:50 A.M. Recess 11:50 A.M. to 12:10 P.M. Opening Statement cont'd 12:10 P.M. to 12:31 P.M. Pltf. reply 12:31 P.M. to 12:33 P.M. Defendant's Motion to Dismiss Action–Decision Reserved. Recess 12:40 P.M. to 1:58 P.M. Plaintiffs' Exhibits 1 through 22 marked for Identification. Plaintiffs' Exhibits 125, 126 & 127, filed. Plaintiffs' Exhibits 1 through 22 for Identification filed as full exhibits. Plaintiffs' Exhibit 35 marked for Identification; Plaintiffs' Exhibit 128 filed; 37 offered, then withdrawn; Plaintiff's Exhibit 38 marked. Exhibit 38 withdrawn. Plaintiff's

Exhibits 129, 130, 131 marked for identification; 22 through 36 marked for identification; 56 through 79 marked for identification; 58 & 60 withdrawn. Objection to 66 sustained and exhibit ordered sealed by Protective Order; Exhibits 56, 57, 59, 61, 62, 63, 64, 65, 67, 68 through 79 filed as full exhibits. Objection to 129 sustained; 130 admitted as full exhibit. Court adjourned at 4:50 p.m. until 10:00 A.M., Dec. 3, 1969. Smith, C. J.; Timbers, D. J.; Blumenfeld, D.J. M-12/4/69.

December 3 - 3-Judge Court continues. Plaintiffs' Exhibits 80–93 marked for identification; 132, 133, 134, 135 and 136 marked for identification; 41 withdrawn; 51 withdrawn; Objection to 43, 44, 45, 46 & 47 is sustained; 49 & 50 will be admitted when missing pages are submitted. Exhibits 39, 40, 42, 48, 52, 53, 54 & 55 for identification filed as full exhibits; 95–124 marked for Iden. (Sacred Heart); Objection sustained to Plaintiffs' Exhibits 86, 87; 92 withdrawn; 94 not offered or marked; 137 filed; 138 filed; 96, 98, 99, 102 withdrawn; Objection to 104 sustained; 105 withdrawn 107, 110, 112; Exhibits 80 and 82 thru 85, and 88–91 filed as full exhibits; 93 filed as full exhibit; Objection to 111 sustained; 122 & 123 withdrawn; 95, 97, 100, 101, 103, 105, 106, 108, 109, 113 through 121 & 124 filed as full exhibits; 81 for identification–withdrawn. 3 Plaintiffs' witnesses sworn and testified. Court adjourned at 4:25 P.M. until 10:00 A.M., Dec. 4, 1969. Smith, C.J.; Timbers, D. J. Blumenfeld, D. J. M-12/4 69.

December 4 - 3 Judge Court Continues. Plaintiffs' Exhibits for Identification 87, 129, 132, 133, 134, 135, 136, filed as full exhibits; 28 for identification withdrawn. Excerpts of statements by Mr. Axelrod and Mr. Pfeffer filed by Collard, R.–6 page transcript. Plaintiffs rest, subject to marking of Plaintiffs' Exhibits 142, 143, 144 & 145 as full exhibits. Defendant's (U.S.) Motion to Dismiss, For Judgment and to Strike, heard; Defendant's (State of Conn.) Motion to Dismiss, for Judgment and to Strike, heard; Defendants' (Colleges & Universities) Motion to Dismiss, for Judgment and to Strike, heard. Decision Reserved on all

motions. Defendants United States and State of Connecticut will not put on any evidence. Defendant's Exhibits DC-1, DC-2 and DC-3 filed as full exhibits. Defendants recalled Father McInness to stand. Defendant's Exhibits F-1, F-2, F-4, F-6, F-7, filed; F-3 marked for identification. (Defendants' F-5 will not be offered and is withdrawn). Plaintiffs' Exhibit 146 marked for identification. 12 Defendants' witnesses sworn and testified. Plaintiffs' Exhibit 99 for identification, filed as full for defendants. Defendants' Exhibits SH-3 and SH-4 filed. (SH-1 and SH-2 not offered or marked). Defendant recalled Sister Marie Louise Hubert. Defendants' AM-1, filed. Court adjourned at 5:00 P.M., until 10:00 A.M., Dec. 5, 1969. Smith, C.J.; Timbers, D.J.; Blumenfeld, D.J. M-12/8/69.

December 5 - 3 Judge Court Continues. Sister Marie Louise resumes stand. Defendants' Exhibit AM-2 filed as full exhibit. Plaintiffs withdraw Plaintiffs' Exhibit 4D and it was offered by defendants as Defendants' Exhibit AM-2-A and received as a full exhibit. Defendants' Exhibit AM-3 filed. Plaintiffs' Exhibit 139 filed. 2 Defendants' witnesses affirmed and testified; 5 Defendants' witnesses sworn and testified. Defendants' Exhibits A-1, A-3, A-4, A-5, A-6, SH-2, AM-2, filed. Defendant Colleges rest. Defendants' A-2 not offered or marked. Defendants Conn. & U.S.A. motion to strike denied. Plaintiffs' Exhibit 140 may be filed when received; Exhibits 49 & 50 for identification filed as full exhibits; Exhibit 52 withdrawn; Exhibits 141, 147 and 148, filed. Plaintiffs rest in rebuttal. Briefs by Jan. 19th, Oral Argument Jan. 22, at 10:00 A.M. Court adjourned at 2:50 P.M. Smith, C.J.; Timbers, D.J.; Blumenfeld, D.J. M-12/8/69.

December 22 - Court Reporter's Transcripts of Proceedings of December 2, 3, 4 & 5 filed. Collard, R.

1970

January 9 - Court Reporter's Notes of Proceedings of December 2 & 5, 1969, filed at Hartford. Collard, R. (Pack 1 of 2)

January 22 - 3-Judge Court Continues. Plaintiff's Exhibit 140 filed as a full exhibit (Fairfield employment contract—was agreed upon at trial but supplied and marked today) Summation by counsel: Mr. Pfeffer—10:06 A.M. to 11:15 A.M.; Mr. Costas—11:15 A.M. to 11:43 A.M. Plaintiff's Exhibit 149 filed (retreat article) Recess: 11:43—11:58 A.M. Mr. Axelrod 11:58 A.M. to 12:16 P.M.; Mr. Ahern 12:16 P.M. to 12:18 P.M. Luncheon Recess 12:18 P.M. to 1:20 P.M.; Mr. Williams—1:21 P.M. to 2:47 P.M.; Mr. Pfeffer—2:48 P.M. to 3:08 P.M. Decision Reserved. Court adjourned at 3:09 P.M. Smith, C.J.; Timbers, D.J.; Blumenfeld, J., D.J. M-1/23/70

February 9 - Court Reporter's Transcript of Proceedings of January 22, 1970, filed at Hartford. Collard, R. (Given to Judge Smith)

March 19 - Opinion filed. (1) The Court has jurisdiction over the subject matter and the parties; (2) The Act authorizes the grants made to defendant colleges and universities for construction of academic facilities; (3) The Act and grants thereunder to not impair plaintiffs' rights under the establishment clause or the free exercise clause of the First Amendment; (4) The Act and grants thereunder do not discriminate against non-sectarian institutions by depriving them of federal funds in violation of the First and Fourteenth Amendments; (5) Plaintiffs are not entitled to injunctive relief against defendants; (6) Defendants are entitled to judgment dismissing the complaint, but without costs. This opinion, together with the separately stated Findings of Fact and Conclusions of Law filed herewith, constitute the Court's Finding of Fact and Conclusions of Law pursuant to Rule 52(a), Fed. R. Civ. P. Defendants' motions to dismiss, which were made at the close of plaintiffs' opening statement and at the close of plaintiffs' case, are denied. Various motions to strike evidence, upon which the Court reserved decision, are denied insofar as they are directed at evidence which supports the Court's findings of fact and conclusions of law; in all other respects, the mo-

tions are dismissed as moot. J. Joseph Smith, U.S.C.J.; William H. Timbers, U.S.D.J.; M. Joseph Blumenfeld, U.S. D.J. M-3/19/70.

March 19 - Findings of Fact and Conclusions of Law, filed. J. Joseph Smith, U.S.C.J.; Wm. H. Timbers, U.S.D.J.; M. Joseph Blumenfeld, U.S.D.J. M-3/19/70.

March 19 - Judgment entered that (1) judgment be, and it hereby is, entered on the merits in favor of defendants, denying all relief sought by plaintiffs and dismissing the complaint; (2) the no costs shall be taxed against any party to this action. J. Joseph Smith, U.S.C.J.; Wm. H. Timbers, U.S.D.J.; M. Joseph Blumenfeld, U.S.D.J. M-3/19/70.

April 8 - Notice of Appeal, filed by plaintiffs. Copies mailed to all Counsel and three Judges.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ELEANOR TAFT TILTON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RAISNER, ELISABETH R SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANSHARD, JAY S. ROTH, CARL W. SCHAEFER, NORMAN T. DAVIS, HERBERT I. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PENDLETON
Plaintiffs

v. Civil Action No.____

WILBUR J. COHEN, Secretary of the United States Department of Health, Education and Welfare, HAROLD HOWE, 2d, Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE FAIRFIELD UNIVERSITY OF SAINT ROBERT BELLARMINE, ALBERTUS MAGNUS COLLEGE
Defendants

VERIFIED COMPLAINT

STATEMENT AS TO JURISDICTION

1. This is a civil action brought by Plaintiffs, on their own behalf and on behalf of all others similarly situated, for a temporary and permanent injunction against the allocation and use of the funds of the United States to finance, in whole or in part, construction of facilities in sectarian schools, and to declare such use of funds of the United States unconstitutional under the First Amendment.

2. Jurisdiction is conferred upon this Court pursuant to Title 28, U.S.C.A., Sections 1331, 2282, 2284, and 2201, and Title 20, U.S.C.A., Section 721.

3. The amount in controversey in this suit, exclusive of interest and costs, is in excess of Ten Thousand Dollars ($10,000) as more fully appears hereinafter.

4. Plaintiff Eleanor Taft Tilton resides in Hartford, Connecticut; Plaintiff Mildred H. Clark resides in New Haven, Connecticut; Plaintiff Carol D. Goldstone resides in Mansfield Center, Connecticut; Plaintiff Theodore Gurney resides in Glastonbury, Connecticut; Plaintiff Harvey L. Raisner resides in Bloomfield, Connecticut; and, Plaintiff Paul A. Reynolds resides in Middletown, Connecticut.

5. Plaintiffs Rufus Blanshard, of Storrs, Connecticut; Norman T. Davis of Mansfield Center, Connecticut; Herbert I. Goldstone or Mansfield Center, Connecticut; Jay S. Roth of Storrs, Connecticut; and Carl W. Schaefer of Storrs, Connecticut, are members of the faculty of the University of Connecticut at Storrs, Connecticut, an institution of higher learning funded primarily by the State of Connecticut, which institution is not organized for nor engaged in the propagation or promotion of the doctrines, teachings and practices of any religion and is open to enrollment of and attracts students of all races and of all or no religious persuasion, and which institution does not require any sectarian training or religious obligations of its students.

6. Plaintiff James W. Gardner, Jr., of Simsbury, Connecticut, is a member of the faculty of Trinity College in Hartford, Connecticut, which, although a private institution of higher learning, is not organized for nor engaged in the propagation or promotion of the doctrines, teachings and practices of any religion and is open to enrollment and attracts students of all races and of any or no religious persuasion, and which does not require any sectarian training or religious obligations of its students.

7. Plaintiff Wyman W. Parker, of Middletown, Connecticut, is a member of the faculty of Wesleyan University in Middletown, Connecticut, which although a private institution of higher learning, is not organized for nor engaged in the propagation or promotion of the doctrines, teachings

and practices of any religion and is open to enrollment and attracts students of all races and of any or no religious persuasion, and which does not require any sectarian training or religious obligations of its students.

8. Plaintiff Elisabeth R. Swain, of Hartford, Connecticut, is a member of the faculty of the University of Hartford, at West Hartford, Connecticut, which, although a private institution of higher learning, is not organized for nor engaged in the propagation or promotion of the doctrines, teachings and practices of any religion and is open to enrollment and attracts students of all races and of any or no religious persuasion, and which does not require any sectarian training or religious obligations of its students.

9. Plaintiff Charles L. Pendleton of West Hartford, Connecticut is the parent of a student enrolled at the University of Connecticut, in Storrs, Connecticut and contributes to the support of the education of his son at the University of Connecticut by the payment of taxes to the State of Connecticut and by other financial assistance.

10. Each of the Plaintiffs in Paragraph 4 through 9 above is a citizen and resident of the United States and of the State of Connecticut. Each plaintiff pays income and other taxes to the United States and is a qualified local voter of the United States.

11. A. Defendant Wilbur J. Cohen is Secretary of the United States Department of Health, Education and Welfare and is sued herein in that capacity.

11. B. Defendant Harold Howe, 2d, is Commissioner of Education of the United States and is sued herein in that capacity.

11. C. Defendant Marvin K. Peterson is Chairman of the Commission on Aid to Higher Education of the State of Connecticut and is sued herein in that capacity. He and other members of the Commission are appointed by the Governor of the State of Connecticut and recommend to defendants Wilbur J. Cohen and Harold Howe, 2d, the in-

stitution of higher learning within the State of Connecticut and the grants to be made to such institutions pursuant to the Higher Education Facilities Act of 1963.

II. FACTUAL ALLEGATIONS

12. Defendants Sacred Heart University, located in Bridgeport, Connecticut, Annhurst College, located in South Woodstock, Connecticut, Fairfield University of Saint Robert Bellarmine (hereinafter called "Fairfield University"), located in Fairfield, Connecticut and Albertus Magnus College, located in New Haven, Connecticut, are such sectarian educational institutions at the college or university level organized for and engaged in the propagation and promotion of the doctrine, teachings and practices of the Roman Catholic religion as more fully set forth herein.

13. Defendant Sacred Heart University is an institution of higher learning organized, conducted and controlled by the Diocese of Bridgeport of the Roman Catholic Church in accordance with the dogma and doctrines of said church for the purpose of providing a Catholic education for all Catholic youths.

14. Defendant Annhurst College is an institution of higher learning organized, conducted and controlled by the Daughters of the Holy Spirit, a religious society of the Roman Catholic Church, in accordance with the dogma and doctrines of said church, for the purposes of propagating and promoting the Roman Catholic faith.

15. Defendant Fairfield University is an institution of higher learning organized, conducted and controlled by the Society of Jesus, a religious society of the Roman Catholic Church, in accordance with the dogma and doctrines of said church, for the purpose of propagating and promoting the Roman Catholic faith.

16. Defendant Albertus Magnus College is an institution of higher learning organized, conducted and controlled by the Dominican Sisters of St. Mary, a religious society of the Roman Catholic Church in accordance with the dogma and

doctrines of said church for the purpose of propagating and promoting the Roman Catholic faith.

17. In 1963, the Congress of the United States enacted, and the President of the United States approved, P.L. 88-204 (Title 20, U.S.C.A., Sections 701-758) known as the Higher EducationFacilities Act of 1963, subchapter 1 whereof authorizes grants of Federal funds for the construction of undergraduate academic facilities.

18. The Higher Education Facilities Act of 1963 empowers and requires the defendant, Harold Howe, 2d, in his capacity as Commissioner of Education, to pass upon all applications for Federal funds and to withhold approval from any program which does not comply with the terms, condition and limitations of the Act.

19. Defendant Marvin K. Peterson and other members of the Commission are appointed by the Governor of the State of Connecticut pursuant to Section 3-10A of the Connecticut General Statutes, and their predecessors, have made recommendations to the defendant Commissioner of Education for grants of various sums to be made to the defendant institutions of higher learning, which recommendations purport to be made in conformity with the terms of the Higher Education Facilities Act of 1963.

20. Purporting to act in conformity with the terms of Higher Education Facilities Act of 1963, the defendant Commissioner of Education notified defendant Sacred Heart University that it had been granted $367,100 for construction of a library estimated to cost $1,124,800. Plaintiffs are advised and believe that defendant Commissioner has caused to be paid to defendant Sacred Heart University $190,263 in Federal funds and that the remaining funds will be paid over to defendant Sacred Heart University unless this court enjoins said payment.

21. Purporting to act in conformity with the terms of the Higher Education Facilities Act of 1963, defendant Commissioner of Education notified defendant Annhurst

College that it had been granted $350,697 for construction of a building for music, drama and arts estimated to cost $1,565,781. Plaintiffs are advised and believe said Federal funds will be paid over to defendant Annhurst College unless this court enjoins said payment.

22. Purporting to act in conformity with the terms of the Higher Education Facilities Act of 1963, the defendant Commissioner of Education notified defendant Fairfield University that it had been granted $245,310 for construction of a science building estimated to cost $3,277,712. Plaintiffs are advised and believe said Federal funds will be paid over to defendant Fairfield University unless this court enjoins said payment.

23. Purporting to act in conformity with the terms of the Higher Education Facilities Act of 1963, the defendant Commissioner of Education notified defendant Fairfield University that it had been granted $500,000 for construction of a library estimated to cost $1,662,000. Plaintiffs are advised and believe that as of this date defendant Commissioner of Education has caused to be paid to defendant Fairfield University $297,340 in Federal funds and that the remaining funds will be paid over to defendant Fairfield University unless this court enjoins said payment.

24. Purporting to act in conformity with the terms of the Higher Education Facilities Act of 1963, the defendant Commissioner of Education notified defendant Albertus Magnus College that it had been granted $24,632 for laboratories in a general purpose building estimated to cost $1,577,868. Plaintiffs are advised and believe said Federal funds will be paid over to defendant Albertus Magnus College unless this court enjoins said payment.

25. It was not the intention of Congress in enacting subchapter 1 of the Higher Education Facilities Act of 1963 to require or permit Federal agencies to violate the prohibitions of the First Amendment to the United States Constitution but Congress intended to limit such expenditures to those educational institutions which by their nature, could receive Federal funds, under the First Amendment.

26. Upon information and belief, there are many schools in Connecticut which qualify under the terms of the Higher Education Facilities Act of 1963 for grants for construction of facilities to expand pupil enrollment, which could receive such grants without violating the provisions of the First Amendment, including but not limited to the University of Connecticut, Trinity College, University of Hartford and Wesleyan University.

27. Upon information and belief, the secular purposes of the Congress in enacting the Higher Education Facilities Act of 1963 can be achieved without granting Federal funds to sectarian educational institutions organized for and engaged in the propagation and promotion of sectarian religion.

28. In the event that it was the intent of Congress to permit the expenditure of Federal funds for construction of facilities at sectarian institutions and the law is being administered in accordance with such intent by Defendants Wilbur J. Cohen and Harold Howe, 2d, then, to that extent, the Higher Education Facilities Act of 1963 violates the prohibitions of the First Amendment to the United States Constitution.

III. CAUSES OF ACTION

29. *First Count:* The determinations and actions of the defendants violate the First and Fourteenth Amendments to the United States Constitution in that they constitute a law respecting an establishment of religion by reason of the fact that they effect a contribution of tax-raised funds to the support of institutions which teach the tenets of a church and constitute governmental financing of religious groups and government action whose purpose and primary effect is to advance religion.

30. *Second Count:* The determinations and actions of the defendants violate the First and Fourteenth Amendments to the United States Constitution in that they prohibit the free exercise of religion on the part of the plaintiffs and the

class they represent by reason of the fact that they constitute compulsory taxation for religious purposes.

31. *Third Count:* The determinations and actions of the defendants violate the First and Fourteenth Amendments to the United States Constitution in that they deprive nonsectarian institutions of higher learning which are open to and attract students of all races and of all or no religious persuasion of those funds which are granted to sectarian institutions of higher learning, and which funds might be used for the benefit of all potential students rather than a limited class of students.

IV. OTHER ALLEGATIONS

32. This suit involves a genuine case or controversy between the plaintiffs and the defendants.

33. The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

34. The consciences of all of the plaintiffs are offended by the use of any portion of the taxes, which they are compelled to pay, for the support of institutions which teach and promulgate the tenets of any church and which thereby advance religion either directly or indirectly.

V. PRAYERS FOR RELIEF

35. The plaintiffs pray that the following relief be granted:

(1) That a three-judge court be convened as provided in Title 28, Sections 2282 and 2284 of the U.S. Code to declare unconstitutional the determinations and actions of the defendants as hereinbefore set forth.

(2) That the court adjudge and declare that the determinations and actions of the defendants as hereinbefore set forth are not authorized or intended by the Higher Education Facilities Act of 1963, or in the alternative if such determinations and actions are within the authority and intent of the Act, the Act is to that extent unconstitutional and void.

(3) That the defendants, Wilbur J. Cohen and Harold Howe 2d, and each of them be enjoined from approving any program for the expenditure of Federal funds to finance in whole or in part construction of facilities in sectarian educational institutions.

(4) That the defendant, Marvin K. Peterson and the other members of the Commission on Aid to Higher Education be enjoined from recommending any program for the expenditure of Federal funds to finance in whole or in part construction of facilities in sectarian educational institutions.

(5) That defendants Sacred Heart University, Annhurst College, Albertus Magnus College and Fairfield University, and each of them, be enjoined from receiving any more Federal funds under grants already awarded under the Higher Educational Facilities Act of 1963 or from applying for new grants under said Act.

(6) That a preliminary injunction pending the trial of the issue be granted to the plaintiffs against the defendants for the relief set forth herein.

(7) That the plaintiffs be granted such other and further relief as to the Court may seem just and proper.

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By_____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

[Caption omitted in printing]

ANSWER OF DEFENDANTS SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY OF SAINT ROBERT BELLARMINE, AND ALBERTUS MAGNUS COLLEGE

First Defense

Plaintiffs' complaint fails to state a cause of action entitling them to relief.

Second Defense

FIRST: Defendants admit the allegations of Paragraph 1 except the allegation that the action is brought on behalf of all others similarly situated as to which defendants are without knowledge or information sufficient to form a belief as to the truth thereof.

SECOND: Defendants admit the allegations of Paragraph 2 of the complaint, except that defendants deny that jurisdiction is conferred upon this Court by Title 20, U.S.C., Section 721.

THIRD: Defendants admit that the amount in controversy in this action, exclusive of interest and costs, is in excess of Ten Thousand Dollars ($10,000), as alleged in Paragraph 3 of the complaint.

FOURTH: Defendants allege that they are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraphs 4 through 10 of the complaint.

FIFTH: Defendants admit the allegations of Paragraphs 11A and 11B and upon information and belief admit the allegations of Paragraph 11C.

SIXTH: Defendants Sacred Heart University, located in Bridgeport, Connecticut, Annhurst College, located in South Woodstock, Connecticut, Fairfield University of Saint Rob-

ert Bellarmine (hereinafter called "Fairfield University"), located in Fairfield, Connecticut and Albertus Magnus College, located in New Haven, Connecticut admit that they are educational institutions at the college or university level, but deny that they are sectarian and organized for and engaged in the propagation and promotion of the doctrinal teachings and practices of the Roman Catholic Religion as alleged by plaintiffs in paragraph 12.

SEVENTH: Defendant Sacred Heart University admits that it is an institution of higher learning, but denies that it is organized, conducted and controlled by the Diocese of Bridgeport of the Roman Catholic Church in accordance with the dogma and doctrines of said church for the purpose of providing a Catholic education for all Catholic youths as alleged by plaintiffs in paragraph 13.

EIGHTH: Defendant Annhurst College admits that it is an institution of higher learning, but denies that it is organized, conducted and controlled by the Daughters of the Holy Spirit, a religious society of the Roman Catholic Church, in accordance with the dogma and doctrines of said church, for the purposes of propagating and promoting the Roman Catholic faith as alleged by plaintiffs in paragraph 14.

NINTH: Defendant Fairfield University admits that it is an institution of higher learning, but denies that it is organized, conducted and controlled by the Society of Jesus, a religious society of the Roman Catholic Church, in accordance with the dogma and doctrines of said church, for the purpose of propagating and promoting the Roman Catholic faith as alleged by plaintiffs in paragraph 15.

TENTH: Defendant Albertus Magnus College admits that it is an institution of higher learning, but denies that it is organized, conducted and controlled by the Dominican Sisters of St. Mary, a religious society of the Roman Catholic Church in accordance with the dogma and doctrines of said church for the purpose of propagating and promoting

the Roman Catholic faith as alleged by plaintiffs in paragraph 16.

ELEVENTH: Defendants admit that in 1963, the Congress of the United States enacted, and the President of the United States approved, P.L. 88-204 known as the Higher Education Facilities Act of 1963 and that subchapters 1 and 4 (Title 20 U.S.C.A. §§ 701-721 and 751-758) thereof authorize grants of Federal funds for the construction of undergraduate academic facilities.

TWELFTH: Defendants admit the allegations of Paragraphs 18 and 19 of the complaint.

THIRTEENTH: Defendant Sacred Heart University admits that the allegations of Paragraph 20 are substantially correct.

FOURTEENTH: Defendant Annhurst College admits the allegations of Paragraph 21.

FIFTEENTH: Defendant Fairfield University admits that the allegations of Paragraph 22 are substantially correct.

SIXTEENTH: Defendant Fairfield University admits the allegations of Paragraph 23.

SEVENTEENTH: Defendant Albertus Magnus College admits the allegations of Paragraph 24.

EIGHTEENTH: Defendants deny each and every allegation of Paragraph 25 of the complaint, except that defendants admit that Congress had no intention to act inconsistently with the First Amendment in enacting subchapter 1 of the Higher Education Facilities Act of 1963.

NINETEENTH: Defendants allege that they are without information and knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraphs 26 and 27 of the complaint.

TWENTIETH: Defendants deny the allegations contained in Paragraphs 28 - 31 of the complaint.

TWENTY-FIRST: Defendants admit that a genuine case or controversy exists between the plaintiffs and defendants in this suit, as alleged in Paragraph 32 of the complaint.

TWENTY-SECOND: Defendants deny each and every allegation contained in Paragraph 33 of the complaint.

TWENTY-THIRD: Defendants allege that they are without information and knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 34 of the complaint.

Defendants' Affirmative Defense
To Plaintiffs' Third Count

Plaintiffs are without standing to assert the claim contained in the third count of their complaint.

WHEREFORE, defendants demand judgment dismissing the complaint and awarding them the costs and disbursements of this action.

WILLIAMS & CONNOLLY

Edward Bennett Williams

Jeremiah C. Collins

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Albertus Magnus College

[Certificate of service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

[Caption omitted in printing]

ANSWER

Now come defendants Wilbur J. Cohen and Harold Howe 2d (hereinafter referred to as defendants), by their undersigned attorneys, and for their answer admit, deny, and otherwise aver as follows:

FIRST DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

SECOND DEFENSE

Plaintiffs lack standing to maintain this action.

THIRD DEFENSE

The complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

In answer to the numbered paragraphs of the complaint herein, defendants admit, deny, and allege as follows:

1. Deny the allegations contained in Paragraph 1 of the complaint.

2. Deny the allegations contained in Paragraph 2 of the complaint.

3 through 10, inclusive. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in Paragraphs 3 through 10, inclusive, of the complaint.

11. Admit the allegations contained in Paragraph 11 of the complaint.

12. Admit so much of Paragraph 12 of the complaint as alleges that Sacred Heart University is located in Bridgeport, Connecticut; that Annhurst College is located in South Woodstock, Connecticut; that Fairfield University of Saint Robert Bellarmine is located in Fairfield, Connecticut; that Albertus Magnus College is located in New Haven, Connecticut; and that these schools are each educational institutions at the college or university level, and deny the remaining allegations contained in Paragraph 12 of the complaint.

13. Admit so much of Paragraph 13 of the complaint as alleges that Sacred Heart University is an institution of higher learning and deny the remaining allegations contained in Paragraph 13 of the complaint.

14. Admit so much of Paragraph 14 of the complaint as alleges that Annhurst College is an institution of higher learning and deny the remaining allegations contained in Paragraph 14 of the complaint.

15. Admit so much of Paragraph 15 of the complaint as alleges that Fairfield University is an institution of higher learning and deny the remaining allegations contained in Paragraph 15 of the complaint.

16. Admit so much of Paragraph 16 of the complaint as alleges that Albertus Magnus College is an institution of higher learning and deny the remaining allegations contained in Paragraph 16 of the complaint.

17 and 18, inclusive. Deny, except that defendants admit that in 1963 Congress enacted and the President approved P.L. 88-204, and the Court is respectfully referred to 20 U.S.C. 701-758, inclusive, for the terms thereof.

19. Admit the allegations contained in Paragraph 19 of the complaint.

20. Deny the allegations contained in Paragraph 20 of the complaint, except that defendants admit that defendant Commissioner of Education acted in conformity with the Higher Education Facilities Act of 1963 in authorizing the grant referred to in said paragraph and aver that the estimated eligible development cost for the library referred to in said paragraph is $1,105,800 and that $291,649 had been paid toward the federal share of said cost as of November 13, 1968.

21. Deny the allegations contained in Paragraph 21 of the complaint, except that defendants admit that defendant Commissioner of Education acted in conformity with the Higher Education Facilities Act of 1963 in authorizing the grant referred to in said paragraph and aver that the estimated eligible development cost for the building for music, drama and arts referred to in said paragraph is $1,329,717.

22. Deny the allegations contained in Paragraph 22 of the complaint, except that defendants admit that defendant Commissioner of Education acted in conformity with the Higher Education Facilities Act of 1963 in authorizing the grant referred to in said paragraph and aver that the estimated cost of the science building is $3,862,630 and eligible development cost is $3,469,194.

23. Deny the allegations contained in Paragraph 23 of the complaint, except that defendants admit that defend-

ant Commissioner of Education acted in conformity with the Higher Education Facilities Act of 1963 in authorizing the grant referred to in said paragraph and aver that the estimated eligible development cost of the library referred to in said paragraph is $1,653,000 and that $439,464 has been paid toward the federal share of said cost as of November 13, 1968.

24. Deny the allegations contained in Paragraph 24 of the complaint, except that defendants admit that defendant Commissioner of Education acted in conformity with the Higher Education Facilities Act of 1963 in authorizing the grant referred to in said paragraph and aver that the grant referred to in said paragraph was for a language laboratory in a general purpose building; that the current estimate of said building's cost is $1,577,868; and that the estimated eligible development cost of said language laboratory is $73,895.

25. The allegations contained in Paragraph 25 of the complaint are conclusions of law not requiring answer, and the Court is respectfully referred to 20 U.S.C. 701-758, inclusive, for the provisions of the Higher Education Facilities Act of 1963.

26. Admit except that defendants aver that the schools named as defendants in the instant action as well as the University of Connecticut, Trinity College, University of Hartford, and Wesleyan University are eligible to receive grants without violating the First Amendment.

27. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in Paragraph 27 of the complaint.

28 through 33, inclusive. Deny the allegations contained in Paragraphs 28 through 33, inclusive, of the complaint.

34. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in Paragraph 34 of the complaint.

35. Deny that plaintiffs are entitled to any relief whatsoever.

Defendants deny each and every allegation of the complaint not specifically admitted, qualified, or denied above.

WHEREFORE, defendants pray that plaintiffs be denied any relief and that this action be dismissed with prejudice.

Respectfully submitted,

/s/ Edwin L. Weisl, Jr.
Assistant Attorney General

/s/ Jon O. Newman
United States Attorney

/s/ Harland F. Leathers

/s/ Jeffrey F. Axelrad

Attorneys, Department of Justice

Attorneys for Defendants

[Certificate of service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Caption omitted in printing]

ANSWER OF DEFENDANT MARVIN K. PETERSON, CHAIRMAN OF THE COMMISSION ON AID TO HIGHER EDUCATION OF THE STATE OF CONNECTICUT

1. Paragraphs 4, 5, 11 A, 11 B, 17, 18, 19, 20, 21, 22, 23, and 24 of the complaint are admitted.

2. Paragraphs 2, 3, 29, 30, 31, 32, 33, 34 of the complaint are denied.

3. So much of Paragraph 1 as alleges that this is a civil action brought by Plaintiffs on their own behalf for a temporary and permanent injunction against the allocation and use of the funds of the United States to finance, in whole

or in part, construction of educational facilities, and to declare use of funds of the United States unconstitutional under the First Amendment to the United States Constitution is admitted; the remaining allegations are denied.

4. So much of Paragraph 6 as alleges that Plaintiff James W. Gardner, Jr., of Simsbury, Connecticut, is a member of the faculty of Trinity College in Hartford, Connecticut, which is a private institution of higher learning is admitted; as to the remaining allegations, this defendant is without knowledge or information sufficient to form a belief and leaves the plaintiffs to their proof.

5. So much of Paragraph 7 as alleges that Plaintiff Wyman W. Parker, of Middletown, Connecticut, is a member of the faculty of Wesleyan University in Middletown, Connecticut, which is a private institution of higher learning is admitted; as to the remaining allegations, this defendant is without knowledge or information sufficient to form a belief and leaves the plaintiffs to their proof.

6. So much of Paragraph 8 as alleges the Plaintiff Elisabeth R. Swain, of Hartford, Connecticut, is a member of the faculty of the University of Hartford, at West Hartford, Connecticut, which is an institution of higher learning is admitted; as to the remaining allegations, this defendant is without knowledge or information sufficient to form a belief and leaves the plaintiffs to their proof.

7. So much of Paragraph 9 as alleges that Plaintiff Charles L. Pendleton is a resident of West Hartford, Connecticut, is admitted; as to the remaining allegations, this defendant is without knowledge or information sufficient to form a belief and leaves the plaintiffs to their proof.

8. So much of Paragraph 10 as alleges that each of the Plaintiffs in Paragraphs 4 through 9 of the complaint is a citizen and resident of the United States and of the State of Connecticut is admitted; as to the remaining allegations, this defendant is without knowledge or information sufficient to form a belief and leaves the Plaintiffs to their proof.

9. So much of Paragraph 11 C as alleges that the Defendant Marvin K. Peterson is Chairman of the Commission on Aid to Higher Education of the State of Connecticut, that he is being sued in that capacity, that he and other members of the Commission are appointed by the Governor of the State of Connecticut and that they recommend to defendants Wilbur J. Cohen and Harold Howe, 2d the grants to be made to institutions of higher learning pursuant to the Higher Education Facilities Act of 1963 is admitted; the remaining allegations are denied.

10. So much of Paragraph 12 as alleges that Defendants Sacred Heart University, located in Bridgeport, Connecticut, Annhurst College, located in South Woodstock, Connecticut, Fairfield University, located in Fairfield, Connecticut and Albertus Magnus College, located in New Haven, Connecticut, are educational institutions at the college or university level is admitted; as to the remaining allegations, this defendant is without knowledge or information sufficient to form a belief and leaves the plaintiffs to their proof.

11. So much of Paragraph 13 as alleges that Defendant Sacred Heart University is an institution of higher learning is admitted; as to the remaining allegations, this defendant is without knowledge or information sufficient to form a belief and leaves the plaintiffs to their proof.

12. So much of Paragraph 14 as alleges that Defendant Annhurst College is an institution of higher learning is admitted; as to the remaining allegations, this defendant is without knowledge or information suffcient to form a belief and leaves the plaintiffs to their proof.

13. So much of Paragraph 15 as alleges that Defendant Fairfield University is an institution of higher learning is admitted; as to the remaining allegations, this defendant is without knowledge or information sufficient to form a belief and leaves the plaintiffs to their proof.

14. So much of Paragraph 16 as alleges that Defendant Albertus Magnus College is an institution of higher learning is admitted; as to the remaining allegations, this defendant

is without knowledge or information sufficient to form a belief and leaves the plaintiffs to their proof.

15. So much of Paragraph 25 as alleges that Congress in enacting the Higher Education Facilities Act of 1963 intended said Act to comply with all the provisions of the United States Constitution is admitted; any other implications which might be derived from said allegations are denied.

16. So much of Paragraph 26 as alleges that there are many educational institutions in Connecticut, including but not limited to the University of Connecticut, which qualify for grants under the terms of the Higher Education Facilities Act of 1963 is admitted; as to the remaining allegations, this defendant is without knowledge or information sufficient to form a belief and leaves the plaintiffs to their proof.

17. As to the allegations in Paragraphs 27 and 28, this defendant is without knowledge or information sufficient to form a belief and leave the plaintiffs to their proof.

THE DEFENDANT
MARVIN K. PETERSON,
Chairman of the Commission on Aid to Higher Education of the State of Connecticut

By: ROBERT K. KILLIAN
ATTORNEY GENERAL

F. MICHAEL AHERN
Assistant Attorney General

His Attorneys

30 Trinity Street
Hartford, Connecticut

[Certificate of service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Caption omitted in printing]

AMENDED COMPLAINT

I. *STATEMENT AS TO JURISDICTION*

1. This is a civil action brought by Plaintiffs, on their own behalf and on behalf of all others similarly situated, for a temporary and permanent injunction against the allocation and use of the funds of the United States to finance, in whole or in part, construction of facilities in sectarian schools, and to declare such use of funds of the United States unconstitutional under the First Amendment.

2. Jurisdiction is conferred upon this Court pursuant to Title 28, U.S.C.A., Sections 1331, 2282, 2284 and 2201, and Title 20, U.S.C.A., Section 721.

3. The amount in controversy in this suit, exclusive of interest and costs, is in excess of Ten Thousand Dollars ($10,000) as more fully appears hereinafter.

4. Plaintiff Eleanor Taft Tilton resides in Hartford, Connecticut, Plaintiff Mildred H. Clark resides in New Haven, Connecticut; Plaintiff Carol D. Goldstone resides in Mansfield Center, Connecticut; Plaintiff Theodore Gurney resides in Glastonbury, Connecticut; Plaintiff Harvey L. Raisner resides in Bloomfield, Connecticut; and Plaintiff Paul A. Reynolds resides in Middletown, Connecticut.

5. Plaintiffs Rufus Blanshard of Storrs, Connecticut; Norman T. Davis of Mansfield Center, Connecticut; Herbert L. Goldstone of Mansfield Center, Connecticut; Jay S. Roth of Storrs, Connecticut; and Carl W. Schaefer of Storrs, Connecticut, are members of the faculty of the University of Connecticut at Storrs, Connecticut, an institution of higher learning funded primarily by the State of Connecticut, which institution is not organized for nor engaged in the propagation or promotion of the doctrines, teachings and practices of any religion and is open to enrollment of

and attracts students of all races and of all or no religious persuasion, and which institution does not require any sectarian training or religious obligations of its students.

6. Plaintiff James W. Gardner, Jr., of Simsbury, Connecticut is a member of the faculty of Trinity College in Hartford, Connecticut, which, although a private institution of higher learning, is not organized for nor engaged in the propagation of promotion of the doctrines, teachings and practices of any religion and is open to enrollment and attracts students of all races and of any or no religious persuasion, and which does not require any sectarian training or religious obligations of its students.

7. Plaintiff Wyman W. Parker, of Middletown, Connecticut, is a member of the faculty of Wesleyan University in Middletown, Connecticut, which, although a private institution of higher learning, is not engaged in nor organized for the propagation or promotion of the doctrines, teachings and practices of any religion and is open to enrollment and attracts students of all races and of any or no religious persuasion, and which does not require any sectarian training or religious obligations of its students.

8. Plaintiff Elisabeth R. Swain of Hartford, Connecticut, is a member of the faculty of the University of Hartford at West Hartford, Connecticut, which, although a private institution of higher learning, is not organized for nor engaged in the propagation or promotion of the doctrines, teachings and practices of any religion and is open to enrollment and attracts students of all races and of any or no religious persuasion, and which does not require any sectarian training or religious obligations of its students.

9. Plaintiff Charles L. Pendleton of West Hartford, Connecticut is the parent of a student enrolled at the University of Connecticut, in Storrs, Connecticut and contributes to the support of the education of his son at the University of Connecticut by the payment of taxes to the State of Connecticut and by other financial assistance.

10. Each of the Plaintiffs in Paragraph 4 through 9 above is a citizen and resident of the United States and of the State of Connecticut. Each plaintiff pays income and other taxes to the United States and is a qualified local voter of the United States.

11. A. Robert H. Finch is Secretary of the United States Department of Health, Education and Welfare and is sued herein in that capacity.

11. B. Defendant James E. Allen, Jr. is Commissioner of Education of the United States and is sued herein in that capacity.

11. C. Defendant Marvin K. Peterson is Chairman of the Commission on Aid to Higher Education of the State of Connecticut and is sued herein in that capacity. He and other members of the Commission are appointed by the Governor of the State of Connecticut and recommend to defendants Robert H. Finch and James E. Allen, Jr., the institutions of higher learning within the State of Connecticut and the grants to be made to such institutions pursuant to the Higher Education Facilities Act of 1963.

II. *FACTUAL ALLEGATIONS*

12. Defendants Sacred Heart University, located in Bridgeport, Connecticut, Annhurst College, located in South Woodstock, Connecticut, Fairfield University, located in Fairfield, Connecticut; and Albertus Magnus College, located in New Haven, Connecticut, are each sectarian educational institutions at the college or university level organized for and engaged in the propagation and promotion of the doctrine, teachings and practices of the Roman Catholic religion as more fully set forth herein.

13. Defendant Sacred Heart University is an institution of higher learning organized, conducted and controlled by the Diocese of Bridgeport of the Roman Catholic Church in accordance with the dogma and doctrines of said church for the purpose of providing a Catholic education for all Catholic youths.

14. Defendant Annhurst College is an institution of higher learning organized, conducted and controlled by the Daughters of the Holy Spirit, a religious society of the Roman Catholic Church, in accordance with the dogma and doctrines of said church, for the purposes of propagating and promoting the Roman Catholic faith.

15. Defendant Fairfield University is an institution of higher learning organized, conducted and controlled by the Society of Jesus, a religious society of the Roman Catholic Church, in accordance with the dogma and doctrines of said church, for the purpose of propagating and promoting the Roman Catholic faith.

16. Defendant Albertus Magnus College is an institution of higher learning organized, conducted and controlled by the Dominican Sisters of St. Mary, a religious society of the Roman Catholic Church in accordance with the dogma and doctrines of said church for the purpose of propagating and promoting the Roman Catholic faith.

17. In 1963, the Congress of the United States enacted, and the President of the United States approved, P.L. 88-204 (Title 20, U.S. C.A., Sections 701-758) known as the Higher Education Facilities Act of 1963, subchapter 1, whereof authorizes grants to Federal funds for the construction of undergraduate academic facilities.

18. The Higher Education Facilities Act of 1963 empowers and requires the defendant, James E. Allen, Jr., in his capacity as Commissioner of Education, to pass upon all applications for Federal funds and to withhold approval from any program which does not comply with the terms, conditions and limitations of the Act.

19. Defendant Marvin K. Peterson and other members of the Commission are appointed by the Governor of the State of Connecticut pursuant to Section 3-10A of the Connecticut General Statutes, and their predecessors have made recommendations to the defendant Commissioner of Education for grants of various sums to be made to the defendant institutions of higher learning, which recommendations

purport to be made in conformity with the terms of the Higher Education Facilities Act of 1963.

20. Purporting to act in conformity with the terms of the Higher Education Facilities Act of 1963, the defendant Commissioner of Education notified defendant Sacred Heart University that it had been granted approximately $367,100 for construction of a library estimated to cost approximately $1,124,800. Plaintiffs are advised and believe that defendant Commissioner has caused to be paid to defendant Sacred Heart University in excess of $190,263 in Federal funds and that the remaining funds will be paid over to defendant Sacred Heart University unless this court enjoins said payment.

21. Purporting to act in conformity with the terms of the Higher Education Facilities Act of 1963, defendant Commissioner of Education notified defendant Annhurst College that it had been granted approximately $350,697 for construction of a building for music, drama and arts estimated to cost approximately $1,565,781. Plaintiffs are advised and believe said Federal funds will be paid over to defendant Annhurst College unless this court enjoins said payment.

22. Purporting to act in conformity with the terms of the Higher Education Facilities Act of 1963, the defendant Commissioner of Education notified defendant Fairfield University that it had been granted approximately $245,310 for construction of a science building stimated to cost approximately $3,277,712. Plaintiffs are advised and believe said Federal funds will be paid over to defendant Fairfield University unless this court enjoins said payment.

23. Purporting to act in conformity with the terms of the Higher Education Facilities Act of 1963, the defendant Commissioner of Education notified defendant Fairfield University that it had been granted approximately $500,000 for construction of a library estimated to cost approximately $1,662,000. Plaintiffs are advised and believe that as of this date defendant Commissioner of Education has caused

to be paid to defendant Fairfield University in excess of $297,340 in Federal funds and that the remaining funds will be paid over to defendant Fairfield University unless this court enjoins said payment.

24. Purporting to act in conformity with the terms of the Higher Education Facilities Act of 1963, the defendant Commissioner of Education notified defendant Albertus Magnus College that it had been granted approximately $24,632 for laboratories in a general purpose building estimated to cost approximately $1,577,868. Plaintiffs are advised and believe said Federal funds will be paid over to defendant Albertus Magnus College unless this court enjoins said payment.

25. It was not the intention of Congress in enacting subchapter 1 of the Higher Education Facilities Act of 1963 to require or permit Federal agencies to violate the prohibitions of the First Amendment to the United States Constitution but Congress intended to limit such expenditures to those educational institutions which by their nature, could receive Federal funds, under the First Amendment.

26. Upon information and belief, there are many schools in Connecticut which qualify under the terms of the Higher Education Facilities Act of 1963 for grants for construction of facilities to expand pupil enrollment, which could receive such grants without violating the provisions of the First Amendment, including but not limited to the University of Connecticut, Trinity College, University of Hartford and Wesleyan University.

27. Upon information and belief, the secular purposes of the Congress in enacting the Higher Education Facilities Act of 1963 can be achieved without granting Federal funds to sectarian educational institutions organized for and engaged in the propagation and promotion of sectarian religion.

28. In the event that it was the intent of Congress to permit the expenditure of Federal funds for construction of facilities at sectarian institutions and the law is being

administered in accordance with such intent by defendants Robert H. Finch and James E. Allen, Jr., then, to that extent, the Higher Education Facilities Act of 1963 violates the prohibitions of the First Amendment to the United States Constitution.

III. *CAUSES OF ACTION*

29. *First Count:* The determinations and actions of the defendants violate the First and Fourteenth Amendments to the United States Constitution in that they constitute a law respecting an establishment of religion by reason of the fact that they effect a contribution of tax-raised funds to the support of institutions which teach the tenets of a church and constitute governmental financing of religious groups and government action whose purpose and primary effect is to advance religion.

30. *Second Count:* The determinations and actions of the defendants violate the First and Fourteenth Amendments to the United States Constitution in that they prohibit the free exercise of religion on the part of the plaintiffs and the class they represent by reason of the fact that they constitute compulsory taxation for religious purposes.

31. *Third Count:* The determinations and actions of the defendants violate the First and Fourteenth Amendments to the United States Constitution in that they deprive non-sectarian institutions of higher learning which are open to and attract students of all races and of all or no religious persuasion of those funds which are granted to sectarian institutions of higher learning, and which funds might be used for the benefit of all potential students rather than a limited class of students.

IV. *OTHER ALLEGATIONS*

32. This suit involves a genuine case or controversy between the plaintiffs and the defendants.

33. The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

34. The consciences of all of the plaintiffs are offended by the use of any portion of the taxes, which they are compelled to pay, for the support of institutions which teach and promulgate the tenets of any church and which thereby advance religion either directly or indirectly.

V. *PRAYERS FOR RELIEF*

35. The plaintiffs pray that the following relief be granted:

(1) That a three-judge court be convened as provided in Title 28, Sections 2282 and 2284 of the U.S. Code to declare unconstitutional the determinations and actions of the defendants as hereinbefore set forth.

(2) That the court adjudge and declare that the determinations and actions of the defendants as hereinbefore set forth are not authorized or intended by the Higher Education Facilities Act of 1963, or in the alternative if such determinations and actions are within the authority and intent of the Act, the Act is to that extent unconstitutional and void.

(3) That the defendants, Robert H. Finch and James E. Allen, Jr., and each of them be enjoined from approving any program for the expenditure of Federal funds to finance in whole or in part construction of facilities in sectarian educational institutions.

(4) That the defendant, Marvin K. Peterson and the other members of the Commission on Aid to Higher Education be enjoined from recommending any program for the expenditure of Federal funds to finance in whole or in part construction of facilities in sectarian educational institutions.

(5) That defendants Sacred Heart University, Annhurst College, Albertus Magnus College and Fairfield University, and each of them, be enjoined from receiving any more Federal funds under grants already awarded under the Higher Education Facilities Act of 1963.

(6) That the plaintiffs be granted such other and further relief as to the Court may seem just and proper.

By: Peter L. Costas
Attorney for All Plaintiffs

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

UNITED STATES DISTRICT COURT

District of Connecticut

Civil No. 12,767

Eleanor Taft Tilton, Mildred H. Clark, Carol D. Goldstone, Theodore Gurney, Harvey L. Raisner, Elisabeth R. Swain, Wyman W. Parker, Paul A. Reynolds, Rufus Blanshard, Jay S. Roth, Carl W. Schaefer, Norman T. David, Herbert T. Goldstone, James W. Gardner, Jr., Charles L. Pendleton,

Plaintiffs,

vs.

Robert H. Finch, Secretary of the United States Department of Health, Education and Welfare, James E. Allen, Jr., Commissioner of Education of the United States, Marvin K. Peterson, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, Sacred Heart University, Annhurst College, Fairfield University, Albertus Magnus College,

Defendants.

Before J. Joseph Smith, Circuit Judge, and Timbers and Blumenfeld, District Judges.

Taxpayers suit seeking declaratory and injunctive relief on the ground that their constitutional rights are impaired by the Higher Education Facilities Act of 1963, 20 U.S.C.

§§701-58 (1964), and by grants thereunder to defendant church related colleges and universities for construction of academic facilities. Judgment for defendants.

Leo Pfeffer, New York, N.Y., Peter L. Costas, Melvin S. Katz, Paul W. Orth, Robert Smith, Hartford, Conn., and Jerry Wagner, Bloomfield, Conn., *for plaintiffs.*

Jeffrey F. Axelrad, Atty., William D. Ruckelhaus, Asst. Atty. Gen., Harland F. Leathers, Atty., Dept. of Justice, Wash. D.C., Stewart H. Jones, U.S. Atty., and F. Mac Buckley, Asst. U.S. Atty., Hartford, Conn., *for defendants Robert H. Finch and James E. Allen, Jr.*

F. Michael Ahern, Asst. Atty. Gen., and Robert K. Killian, Atty. Gen., State of Connecticut, Hartford, Conn., *for defendant Marvin K. Peterson.*

Edward Bennett Williams, Jeremiah C. Collins and Charles H. Wilson, Jr., of Williams & Connolly, Wash. D.C., *for all defendant colleges and universities.*

James J. O'Connell, of Coles, O'Connell & Dolan, Bridgeport, Conn., *for defendant Sacred Heart University.*

Howard T. Owens, of Owens & Schine, Bridgeport, Conn., *for defendants Annhurst College and Fairfield University.*

Donald F. Keefe, Lawrence W. Iannotti and Bruce Lewellyn, of Tyler, Cooper, Grant, Bowerman & Keefe, New Haven, Conn., *for defendant Albertus Magnus College.*

TIMBERS, District Judge:

QUESTIONS PRESENTED

This taxpayers suit seeking declaratory and injunctive relief with respect to the Higher Education Facilities Act of 1963, 20 U.S.C. §§701-58 (1964) (the Act), presents the following essential questions:

(1) Whether the Act authorizes grants to defendant church related colleges and universities for construction of academic facilities.

(2) If so, whether the Act and grants thereunder impair plaintiffs' rights under the establishment clause or the free exercise clause of the First Amendment of the Constitution of the United States.

For the reasons stated below, we hold that the Act does authorize the grants in question and that neither the Act nor the grants thereunder impair plaintiffs' constitutional rights in the respects claimed.[1] Judgment therefore must be entered for defendants dismissing the complaint.

PARTIES TO THE ACTION

Plaintiffs are fifteen residents and citizens of the United States and of Connecticut. They are federal taxpayers suing for themselves and others similarly situated. As taxpayers they have standing to sue. *Flast* v. *Cohen*, 392 U.S.

1. Plaintiffs assert a further claim that, to the extent that funds are granted under the Act to "sectarian" institutions, to that extent "non-sectarian" institutions are deprived of such funds and are discriminated against, in violation of the First and Fourteenth Amendments. We also reject this claim as lacking merit. The eligibility of an institution for grants under the Act does not depend upon its relation to any organized religion.

83, 88-91 (1967); see *Association of Data Processing Service Organizations, Inc.* v. *Camp*, —— U.S. ——, 38 U.S.L.W. 4193 (U.S. March 3, 1970), and *Barlow* v. *Collins*, —— U.S. ——, 38 U.S.L.W. 4195 (U.S. March 3, 1970).

Defendant government officials are the Secretary of the Department of Health, Education and Welfare of the United States, the Commissioner of Education for the United States, and the Chairman of the Connecticut Commission on Aid to Higher Education; they are sued in their official capacities, particularly with respect to their duties in the administration of the Act. Defendant colleges and universities are Sacred Heart University, Annhurst College, Fairfield University and Albertus Magnus College, four church related Connecticut colleges and universities;[2] they are sued as recipients under the Act of grants for the construction of various academic facilities.

CLAIMS OF THE PARTIES

Plaintiffs claim that the Act does not authorize grants to defendant colleges and universities for construction of academic facilities; and, if the Act does authorize such grants, the Act and grants violate the establishment clause and the free exercise clause of the First Amendment. Accordingly, plaintiffs seek (i) a declaratory judgment that

2. The amended complaint alleges that each of the four defendant institutions are "organized for and engaged in the propagation and promotion of the doctrine, teachings and practices of the Roman Catholic religion"; that three of the institutions, Annhurst College, Fairfield University and Albertus Magnus College, are "organized, conducted and controlled" by religious orders; and that the fourth, Sacred Heart University, is "organized, conducted and controlled" by the Diocese of Bridgeport of the Roman Catholic Church. Amended complaint, ¶¶12-16.

the determinations and actions of defendant government officials in allocating federal funds to defendant colleges and universities for construction of academic facilities are not authorized by the Act, or, in the alternative, if the Act authorizes such grants, a declaratory judgment that the Act to that extent is unconstitutional and the grants are void; (ii) injunctive relief enjoining defendant government officials from recommending and approving any program for the expenditure of federal funds to finance in whole or in part construction of academic facilities in "sectarian educational institutions" and enjoining defendant colleges and universities from receiving any more funds already awarded under the Act; and (iii) such further relief as may be just and proper.

Defendants' position is that the grants received by defendant colleges and universities are authorized by the Act and that the Act and grants do not impair plaintiffs' constitutional rights.

JURISDICTION

This Court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §1331(a) (1964).

Since the action seeks injunctive relief with respect to an Act of Congress on the ground of repugnance to the Constitution of the United States, a special statutory district court of three judges were convened to hear and determine the action pursuant to 28 U.S.C. §§2282 and 2284 (1964).

HEARINGS AND RECORD

The pleadings having been closed, the Court held a five day hearing at Hartford on the merits.

The record before the Court consists of the pleadings; facts established by stipulation; some 155 documentary exhibits; and the testimony of 22 witnesses.

Counsel for the respective parties have been fully heard in oral argument; and they have submitted helpful briefs, together with proposed findings of fact and conclusions of law.

CLAIM THAT ACT DOES NOT AUTHORIZE GRANTS TO DEFENDANT COLLEGES AND UNIVERSITIES

The threshold question is whether the Act authorizes grants to defendant colleges and universities for construction of academic facilities, plaintiffs' initial claim being that Congress did not intend to make church related institutions of higher education eligible for grants under the Act.

The Act by its terms neither includes nor excludes church related institutions as such; it simply authorizes grants to "institutions of higher education"[3] of federal funds for construction of academic facilities.

The Act, however, defines an "institution of higher education"—without regard to whether it is church related or not—as an institution which is nonprofit, accredited and legally authorized by the state in which it is located to pro-

3. 20 U.S.C. §§711, 716 (1964).

vide a program of education beyond high school.[4] Since church related colleges and universities may meet these criteria, they may be eligible for grants under the Act.

Moreover, the Act forbids grants for construction of "any facility used or to be used for sectarian instruction or as a place for religious worship" or "any facility which • • • is used or to be used primarily in connection with any part of the program of a school or department of divinity".[5] These limitations in the Act itself make it plain that grants for construction of academic facilities to be used in connection with other functions of church related colleges and universities were contemplated.

Indeed the legislative history is quite conclusive that Congress intended to make the benefits of the Act available to church related colleges and universities.[6] Not only did the sponsors and floor managers of the legislation so state in the debate,[7] but amendments to deny the benefits of the Act to such institutions were voted down.[8]

As to whether the Act authorizes the instant grants to defendant colleges and universities, we hold on the basis of the entire record before the Court that defendant government officials clearly acted in accordance with the provi-

4. 20 U.S.C. §751(f) (1964).

5. 20 U.S.C. §751(a)(2) (1964).

6. For the legislative history of the Act, *see generally* 1963 U.S. Code Cong. and Adm. News, pp. 1172-1202.

7. 109 Cong. Rec. 14150-51 (1963) (Remarks of Representative Powell); *id.* at 14159 (Remarks of Representative Quie); *id.* at 18409-12 (Remarks of Senator Prouty); *id.* at 19427-30 (Remarks of Senator Morse).

8. 109 Cong. Rec. 19492-96 (1963).

sions of the Act and within the scope of their authority in recommending and approving the grants in question.[9]

Having held that the Act authorizes the grants to defendant colleges and universities for construction of academic facilities, we turn now to plaintiffs' claims that the Act and the grants thereunder impair their constitutional rights.

ESTABLISHMENT CLAUSE CLAIM

Plaintiffs' primary claim challenging the constitutionality of the Act and the grants is that they violate the establishment clause of the First Amendment which provides that "Congress shall make no law respecting an establishment of religion. * * *"[10] Plaintiffs assert that federal aid in the form of construction grants to private church related educational institutions constitutes government aid to religion.

The Supreme Court has not ruled on the precise issue here presented, although it has examined the scope and meaning of the establishment clause in several decisions. Only in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and *Board of Education* v. *Allen*, 392 U.S. 236 (1968), how-

9. Reference is made to the Court's separate Findings of Fact filed herewith for a more detailed statement of the nature and purpose of the grants here involved and the manner in which the applications for such grants have been processed by defendant government officials.

10. More specifically, plaintiffs allege as the first count in their amended complaint that the determinations and actions of defendants "effect a contribution of tax-raised funds to the support of institutions which teach the tenets of a church and constitute governmental financing of religious groups and government action whose purpose and primary effect is to advance religion" in violation of the establishment clause. Amended complaint, ¶29.

ever, has the Supreme Court touched upon the establishment clause validity of government aid to private church related education.[11]

Everson involved an establishment clause challenge to a New Jersey statute which provided state reimbursement to parents of parochial school children as well as to parents of public school children for the cost of bus transportation to and from school. The Supreme Court held that the statute did not violate the establishment clause. In the course of its opinion, the Court stated:

"No tax in any amount, large or small, can be levied to support any religious activities or institutions, what-

11. There are pending a number of recent cases involving challenges under the establishment clause of the First Amendment, made applicable to the states by the Fourteenth Amendment, with respect to the validity of state statutes which authorize use of state funds to aid church related education. See, e.g., *Opinion Of The Justices*, —— Me. ——, —— A.2d —— (1970), slip opinion January 15, 1970 (proposed Maine Nonpublic Elementary Education Assistance Act of 1970, authorizing purchase of secular educational services from nonpublic schools, *held* (4-2), to violate establishment clause); *Lemon* v. *Kurtzman*, —— F.Supp. —— (E.D.Pa. 1969), slip opinion November 28, 1969 (Pennsylvania Nonpublic Elementary and Secondary Education Act of 1969, authorizing payment of state funds to nonpublic elementary and secondary schools as reimbursement for teaching certain secular subjects, *held* by a three-judge district court (2-1), not to violate establishment clause); *Vermont Educational Buildings Financing Agency* v. *Mann*, 127 Vt. 262, 247 A.2d 68 (1968), *prob. juris. noted*, 37 U.S.L.W. 3379 (U.S. April 18, 1969); *juris. postponed*, 38 U.S.L.W. 3017 (U.S. July 1, 1969) (Vermont Educational Building Financing Act of 1966, authorizing leasing and subleasing agreements between state agency and church related college for construction of classroom and science building, *held* (4-1), not to violate establishment clause); *Connecticut Civil Liberties Union* v *Sanders*, Civil No. 13432 (D. Conn., complaint filed September 30, 1969, action pending before three-judge district court) (Connecticut Act Concerning Assistance To Nonpublic Schools For Secular Education of 1969, authorizing Secretary of State Board of Education to purchase from nonpublic schools secular educational services for students, challenged, *inter alia*, as violative of establishment clause).

> ever they be called, or whatever form they may adopt to teach or practice religion." 330 U.S. at 16.

Although this language, read in isolation, might suggest that the establishment clause renders impermissible any government aid to church related educational institutions, such suggestion is dispelled by the Court's actual decision sustaining the statute. The Court so held even though it recognized that parochial schools received some benefit from state subsidization of bus transportation for parochial school children. 330 U.S. at 17. The Court noted that a state could not exclude individuals *"because of their faith, or lack of it,* from receiving the benefits of public welfare legislation." (Emphasis that of the Court) 330 U.S. at 16. Since it viewed state subsidization of bus transportation as a public welfare measure in the same category as such general government services relating to schools as police and fire protection, sewage disposal, public highways and sidewalks, it concluded that the challenged statute did not violate the establishment clause. 330 U.S. at 17-18.

Allen, the most recent Supreme Court decision dealing with government aid to church related education, involved an establishment clause challenge to a New York statute authorizing the state to loan secular school textbooks to parochial school students. In determining the validity of the challenged statute, the Court utilized the secular purpose and primary effect test under which "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." 392 U.S. at 243, quoting from *Abington School District* v. *Schempp,* 374

U.S. 203, 222 (1963), where the secular purpose and primary effect test was first enunciated. Applying this test in *Allen*, the Court upheld the statute on the ground that its stated legislative purpose clearly was secular and the primary effect of the loan of secular textbooks could not be said either to advance or inhibit religion.

We are not persuaded by plaintiffs' argument that *Allen* establishes some sort of child-benefit theory under which direct government aid to church related educational institutions is not permissible, while government aid to students attending such institutions is permissible because government aid to an institution in the form of student subsidies is not direct. Although the challenged statute in *Allen* authorized aid to parochial school students and their parents rather than to the schools themselves, the Court neither held nor suggested that the identity of the direct recipient of the aid was the critical factor in determining the constitutionality of the statute under the establishment clause.[12] Moreover, the child-benefit or indirect-direct aid approach would fashion an unacceptable test based on form rather than substance inasmuch as the "constitutional result would depend upon minute distinctions and technicalities." *Lemon* v. *Kurtzman*, *supra* note 11, at .... (slip opinion at 24). Consequently, we view *Allen* as confirming the secular purpose and primary effect test, rather than a child-benefit test, as controlling with respect to the establishment clause validity of the Act.

12. See also *Bradfield* v. *Roberts*, 175 U.S. 291 (1899), a much earlier decision, in which the Court sustained a federal statute authorizing direct federal aid to a hospital owned and controlled by a corporation composed of members of a monastic order or sisterhood of the Roman Catholic Church.

Lemon v. *Kurtzman*, *supra* note 11, at .... (slip opinion at 24-25); *Vermont Educational Buildings Financing Agency* v. *Mann*, *supra* note 11, at 270-71.

Applying the secular purpose and primary effect test to the Act here in question, we find that it clearly meets the first requirement of a secular legislative purpose. The purpose of the Act appears on its face. It contains a congressional declaration that the policy underlying the Act is to increase the student enrollment capacity of the Nation's institutions of higher education through grants for construction of academic facilities to help provide young people with the greatest possible opportunity for higher education; and such declaration is based on congressional findings that there is an urgent need for construction of such facilities to enable these institutions to accommodate anticipated increase in student enrollments.[13] These findings are based on evidence before Congress of the great need for expansion of educational facilities; and of the high proportion of private, including church related, colleges and universities available for such expansion.

13. The Act's statement of congressional findings and declaration of policy reads as follows (20 U.S.C. §701 (1964)):

> "The Congress hereby finds that the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education. The Congress further finds and declares that these needs are so great and these steps so urgent that it is incumbent upon the Nation to take positive and immediate action to meet these needs through assistance to institutions of higher education, including graduate and undergraduate institutions, junior and community colleges, and technical institutes, in providing certain academic facilities."

There was ample rational basis in the evidence before Congress for such findings. We do not believe it to be within our competence to question such findings. *United States* v. *Gainey*, 380 U.S. 63, 66-68 (1965); *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964); *Tot* v. *United States*, 319 U.S. 463, 466 (1943). We hold, based on Congress' declaration of policy and findings, that the Act has the secular purpose of increasing the student enrollment capacity of the Nation's institutions of higher education —an existing urgent public need—and that the Act does not have the purpose of promoting religion of any kind.

The Act also meets the second requirement of a primary effect that neither advances nor inhibits religion. The focus of this test as applied in *Allen* is the function, secular or religious, which the government aid subsidizes—not the nature of the institution, secular or religious, which receives the aid.[14] In *Allen*, the Court noted that it long had recognized that church related educational institutions pursue two goals: secular education and religious instruction. 392 U.S. at 245-48.

The history of church related educational institutions in this Country reflects this dual function. Legislative, judicial, and prevailing social attitudes demonstrate beyond question that church related educational institutions play a large and vital role in providing secular education. Legis-

14. In *Horace Mann League* v. *Board of Public Works*, 242 Md. 645, 220 A.2d 51, *cert. denied, appeal dismissed*, 385 U.S. 97 (1966), the Maryland Court of Appeals held that the constitutionality of direct construction grants under the establishment clause depended on whether the recipient institution was "sectarian". We believe this holding is inconsistent with the controlling *Allen* secular purpose and primary effect test.

lative and judicial determinations have long established that a state's interest in secular education does not require that all children attend publicly operated schools; attendance at church related schools satisfies state compulsory education laws provided the schools meet state secular education requirements. The Supreme Court summarized in *Allen, supra*, at 247-48, from the standpoint of the constitutional standard applied in that case, the relationship of the sectarian function to the secular education function of private schools, including parochial schools:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education."

The Act before us was carefully drafted to insure that grants made to church related educational institutions would subsidize the secular rather than the religious functions of such institutions. It authorizes grants only for the

construction of academic facilities to be used for secular purposes; and specifically prohibits grants for the construction of any facility to be used for religious instruction or worship.[15] In addition, there are other provisions of the Act and administrative regulations which insure that facilities constructed with federal grants are and will be used only for secular purposes.[16] We hold that the Act has a primary effect that neither advances nor inhibits religion.

For the reasons stated above, we conclude that plaintiffs' claim that the Act and grants to defendant colleges and universities for construction of academic facilities impair their rights under the establishment clause is without merit.

FREE EXERCISE CLAUSE CLAIM

Plaintiffs also claim that the Act and grants impair their rights under the free exercise clause on the ground that they effect compulsory taxation for religious purposes.

Since the Act has a secular legislative purpose and a primary effect which neither advances nor inhibits religion, it cannot be said to effect taxation for religious purposes. Moreover, a legislative enactment does not abridge the free exercise clause unless it has a coercive effect on an individual in the practice of his religion. Plaintiffs have not shown that the Act coerces them as individuals in the practice of their religion in any way. *Allen, supra,* at 248-49;

15. 20 U.S.C. §751(a)(2) (1964).

16. 20 U.S.C. §754 (1964); 45 C.F.R. §170.14 (1969); Plaintiffs' Exhibits 125 and 126.

Schempp, supra, at 223; *Lemon, supra*, at —— (slip opinion at 25-27). Therefore, plaintiffs' free exercise claim is without merit.

We are mindful of the centuries of human struggle that culminated in the sixteen cryptic words which constitute the establishment and free exercise clauses of the First Amendment; and we have profound respect for the framers of the Bill of Rights and their determination to erect a wall between church and state which must be kept high and impregnable.[17]

We also recognize the strong national policy of providing higher education for the burgeoning numbers of young men and women who aspire to and are qualified for a higher education.[18] Providing such education may well be critical to the survival of this Nation.

It would be ironic indeed if this Act of Congress, so specifically intended and precisely written to comply with the constitutional standard of a secular legislative purpose and a primary effect that neither advances nor inhibits religion, were to be stricken down in the name of religious freedom. Our careful study of the Act, its legislative history and the entire record before us leaves us with a strong conviction that the Act and the grants do not violate the establishment clause or the free exercise clause of the First Amendment.

In short, here we find no conflict between preservation of religious freedom and provision of higher education. Without both, we may end up with neither.

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17. *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947).

18. See Preamble To Higher Education Facilities Act of 1963, *supra* note 13.

CONCLUSIONS

We hold that:

(1) The Court has jurisdiction over the subject matter and the parties.

(2) The Act authorizes the grants made to defendant colleges and universities for construction of academic facilities.

(3) The Act and grants thereunder do not impair plaintiffs' rights under the establishment clause or the free exercise clause of the First Amendment.

(4) The Act and grants thereunder do not discriminate against non-sectarian institutions by depriving them of federal funds in violation of the First and Fourteenth Amendments.

(5) Plaintiffs are not entitled to injunctive relief against defendants.

(6) Defendants are entitled to judgment dismissing the complaint, but without costs.

This opinion, together with the separately stated Findings of Fact and Conclusions of Law filed herewith, constitute the Court's findings of fact and conclusions of law pursuant to Rule 52(a), Fed. R. Civ. P.

Defendants' motions to dismiss, which were made at the close of plaintiffs' opening statement and at the close of plaintiffs' case, are denied. Various motions to strike evidence upon which the Court reserved decision, are de-

nied insofar as they are directed at evidence which supports the Court's findings of fact and conclusions of law; in all other respects, the motions are dismissed as moot.

Dated at Hartford, Connecticut, this 19th day of March, 1970.

J. JOSEPH SMITH

J. JOSEPH SMITH
United States Circuit Judge

WILLIAM H. TIMBERS

WILLIAM H. TIMBERS
United States District Judge

M. JOSEPH BLUMENFELD

M. JOSEPH BLUMENFELD
United States District Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. 12,767

ELEANOR TAFT TILTON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RAISNER, ELISABETH R. SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANSHARD, JAY S. ROTH, CARL W. SCHAEFER, NORMAN T. DAVID, HERBERT T. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PENDLETON,

Plaintiffs,

vs.

ROBERT H. FINCH, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY, ALBERTUS MAGNUS COLLEGE,

Defendants.

The Court, after full hearing, makes the following Findings of Fact and Conclusions of Law which, together with the Court's opinion filed herewith, constitute the Court's findings of fact and conclusions of law pursuant to Rule 52(a), Fed. R. Civ. P.

FINDINGS OF FACT

(A) The Parties

(1) Plaintiffs are fifteen residents and citizens of the United States and of Connecticut; they are federal taxpayers suing for themselves and others similarly situated; and as taxpayers they have standing to sue.

(2) Defendant Robert H. Finch is Secretary of the Department of Health, Education and Welfare of the United States; in that capacity he has executive responsibility for the operation of federal programs relating to education.

(3) Defendant James E. Allen, Jr. is Commissioner of Education for the United States (Commissioner); in that capacity he is in charge of the Office of Education of the United States (Office of Education), which administers and supervises various federal programs relating to education and assistance thereof.

(4) Defendant Marvin K. Peterson is Chairman of the Connecticut Commission on Aid to Higher Education (Connecticut Commission), which was created to implement the State's participation in the Higher Education Facilities Act of 1963, 20 U.S.C. §§701-58 (1964) (the Act).

(5) Defendant Sacred Heart University is a coeducational liberal arts university located in Fairfield, Connecticut.

(6) Defendant Annhurst College is a liberal arts college for women located in Woodstock, Connecticut.

(7) Defendant Fairfield University is a liberal arts university for men located in Fairfield, Connecticut.

(8) Defendant Albertus Magnus College is a liberal arts college for women located in New Haven, Connecticut.

(B) Statutory Scheme

(9) In 1963, Congress enacted the Higher Education Facilities Act. Title I of the Act (Title I), 20 U.S.C. §§701-21 (1964), authorizes grants of federal funds to institutions of higher education for construction of undergraduate academic facilities.

(10) An institution of higher education is eligible for a Title I grant for construction of an academic facility only if construction of such facility will result in an urgently needed substantial expansion of the institution's student enrollment capacity or of its capacity to carry out one of the other purposes of the Act. 20 U.S.C. §716 (1964).

(11) An "institution of higher education" is defined in the Act as one which:

(a) admits as regular students individuals having a certificate of graduation from a high school, or the recognized equivalent thereof;

(b) is legally authorized within the State to provide a program of education beyond high school;

(c) is a public or other nonprofit institution;

(d) provides an educational program for which it awards a bachelor's degree; or provides not less than a two-year educational program which is ac-

ceptable for full credit toward a degree; or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(3) is accredited by a nationally recognized accrediting agency or association approved for that purpose by the Commission or meets one of the alternatives thereto. 20 U.S.C. §751(f) (1964).

(12) The Act specifically excludes from its definition of academic facilities "any facility used or to be used for sectarian instruction or as a place of religious worship, or * * * any facility which (although not a facility described in the preceding clause), is used or to be used primarily in connection with any part of the program of a school or department of divinity. * * *" 20 U.S.C. §751(a) (2) (1964).

(C) Regulatory Scheme

(13) A State desiring to participate in the Title I grant program must designate a State agency which is broadly representative of the public and of institutions of higher education within the State and must submit to the Commissioner, through that agency, a State plan for participation in the program. 20 U.S.C. §715(a) (1964).

(14) The State of Connecticut designated, as the State agency responsible for administration of the State's re-

sponsibilities under Title I, the Connecticut Commission, which is broadly representative of the public and of institutions of higher education in the State.

(15) In 1964, the Connecticut Commission adopted a State plan for participation in the Title I grant program; the plan was submitted to and approved by the Commissioner; the plan complies with all pertinent provisions of the Act.

(16) The Connecticut Commission receives applications for Title 1 grants from institutions of higher education throughout the State of Connecticut.

(17) In accordance with the procedures of the Connecticut Commission, applications for grants are submitted on forms provided by the Commissioner.

(18) Instructions which accompany applications for use in their preparation and submission emphasize that academic facilities to be used for sectarian instruction, religious worship or primarily in connection with any part of the program of a school or department of divinity are not eligible for grants; in each application the institution applying for a grant gives certain assurances, including assurances that no part of the areas included in the proposed project will be used for such proscribed purposes.

(19) The Connecticut Commission employs a staff which reviews the applications to determine whether they meet various statutory criteria of eligibility, the requirements of the Commissioner and the requirements of the State plan adopted by the Connecticut Commission.

(20) Applications which are found to meet the statutory criteria of eligibility are then evaluated by the Connecticut Commission with respect to several factors contained in the State plan to determine the relative priorities of eligible projects for proper allocation of federal funds available to Connecticut in a particular fiscal year. The setting of relative priorities among eligible projects is specifically required by the Act. 20 U.S.C. §717(a) (1964). The factors taken into account by the Connecticut Commission in setting the relative priorities are the projected future enrollment increases at an institution (both numerical and percentage); the institution's projected increase in facilities (both numerical and percentage); and the institution's utilization of facilities (which is determined according to a capacity/enrollment ratio, average weekly use of classrooms and average weekly use of laboratories). Consideration of these factors is intended to assure that the limited federal funds available for Title I projects will be awarded for those projects for which there is an urgent need consistent with the purposes of the Act.

(21) Based on the procedures described above in paragraphs (16) through (20), the Connecticut Commission decides which projects to recommend for grants and the amounts of the grants to be recommended. The recommendations of the Connecticut Commission are forwarded to the Commissioner for further review.

(22) The Office of Education maintains a staff which reviews the recommendations for grants from several state agencies. The Office of Education seeks to assure itself that the applicant has complied with all applicable provisions of the Act and regulations promulgated thereunder,

including the requirement that no eligible portion of a federally funded facility be used for religious worship or sectarian instruction or in connection with the program of a school or department of divinity.

(23) A grant under Title I is not approved unless the Office of Education is satisfied on the basis of its review of each application that the provisions of the Act and the regulations have been complied with. Where necessary or appropriate to the making of this determination, other information supplied by an applicant or otherwise available to the Office of Education is also taken into consideration.

(24) Successful applicants, upon being notified directly by the Office of Education that their grants have been approved, then execute a "Grant Agreement" which signifies their acceptance of the federal financial assistance.

(25) Thereafter, before grant funds may be disbursed, the following steps must be taken:

(a) Final working drawings and specifications of the funded facility must be submitted to and approved by the Commissioner.

(b) Standard "Terms and Conditions", incorporated into all grant agreements, must be satisfied.

(D) The Grants

(26) Sacred Heart University submitted an application to the Connecticut Commission for a Title I grant for construction of a new library.

(27) Annhurst College submitted an application to the Connecticut Commission for a Title I grant for construc-

tion of a new music, drama and arts building with an auditorium to be used for general academic programs.

(28) Fairfield University submitted an application to the Connecticut Commission for a Title I grant for construction of a new library building.

(29) Fairfield University also submitted an application to the Connecticut Commission for a Title I grant for construction of a new science building to house the biology, chemistry, mathematics and physics departments, the computer instructional and research division and some biology-related functions of the psychology department; the grant requested was for construction of the science building minus the computer facilities.

(30) Albertus Magnus College submitted an application to the Connecticut Commission for a Title I grant for construction of academic facilities to be located in a general academic building containing classrooms, faculty and administrative offices, faculty seminar room, student study area, language laboratories and adjoining offices and necessary related service and maintenance facilities; the grant was requested for construction of tw olanguage laboratories and adjoining offices and necessary related service facility in the general academic building.

(31) Each of these applications affirmatively demonstrated that the grant for which application was made would result in an urgently needed substantial expansion of the institution's student enrollment capacity and would be used solely for construction of secular academic facilities.

(32) Each of these applications affirmatively demonstrated that the grant for which application was made would be used only for construction of the facility specified therein; and that no part of any funds granted would be used to defray any part of the cost of any facility used or to be used for sectarian instruction or as a place for religious worship, or for any facility used or to be used primarily in connection with any part of the program of a school or department of divinity.

(33) The Connecticut Commission properly recommended each of these applications and transmitted them to the Office of Education which in turn properly approved each of them.

(34) Sacred Heart University has been the recipient of a Title I grant in amount of $367,100 for construction of a library which has been completed.

(35) The Sacred Heart University Library opened in November, 1968. The University presented evidence that no classes have been conducted in the library; that no restrictions have been imposed on the books that may be acquired for the library; that no religious worship or services have been conducted in the library; and that there are no religious symbols or plaques in or on the library. Plaintiffs presented no evidence to the contrary. The Sacred Heart University Library, and the federal funds which assisted its construction, have been used solely for non-religious purposes.

(36) Annhurst College has been the recipient of a Title I grant in amount of $444,182 for construction of a fine arts

building with an auditorium which is currently under construction.

(37) The Annhurst College Fine Arts Building was scheduled for occupancy sometime after January, 1970. The College presented evidence that the building will be used for courses in music, art and drama; that no religious worship or services will be conducted in the building; and that there will be no religious symbols or plaques in or on the building. Plaintiffs presented no evidence to the contrary. The Annhurst College Fine Arts Building, and the federal funds which are assisting its construction, will be used solely for non-religious purposes.

(38) Fairfield University has been the recipient of two Title I grants. The first was in amount of $500,000 for construction of a library which has been completed. The second was in amount of $537,500 for construction of a science building which is currently under construction.

(39) The Fairfield University Library opened in September, 1968. The University presented evidence that the library has been used only for the purposes stated in its grant application; that no restrictions have been imposed on the books that may be acquired for the library; that no classes have been conducted in the library; that no religious worship or services have been conducted in the library; and that there are no religious symbols or plaques in or on the library. Plaintiffs presented no evidence to the contrary. The Fairfield University Library, and the federal funds which assisted its construction, have been used solely for non-religious purposes.

(40) The Fairfield University Science Building, which was under construction at the time of trial, is scheduled to be completed in February, 1971. The University has represented to the federal government that the building will house its physics, chemistry, mathematics and biology departments, a portion of its psychology department, and a computer center. The University presented evidence that no limitations, religious or otherwise, will be imposed on the content of the courses that will be taught in the new building; that no religious worship or services will be conducted in the building; and that there will be no religious symbols or plaques in or on the building. Plaintiffs presented no evidence to the contrary. The Fairfield University Science Building, and the federal funds which are assisting its construction, will be used solely for non-religious purposes.

(41) Albertus Magnus College has been the recipient of a Title I grant in amount of approximately $21,000 for construction of a language laboratory which has been completed.

(42) The Albertus Magnus College Language Laboratory became operational in 1966. It has been used by students in modern foreign language courses as a means of improving their pronunciation. The College presented evidence that the language laboratory has been used for no purpose other than to assist students in improving their pronunciation; that the language laboratory has been used only for the purposes stated in the grant application; that no religious worship or services have been conducted the language laboratory, and that there are no religious symbols or plaques in or on the language laboratory.

Plaintiffs presented no evidence to the contrary. The Albertus Magnus College Language Laboratory, and the federal funds which assisted its construction, have been used solely for non-religious purposes.

CONCLUSIONS OF LAW

(1) The Court has jurisdiction over the subject matter and the parties.

(2) This action is an adversary one presenting a justiciable controversy between the parties.

(3) Plaintiffs as federal taxpayers are properly representative of the class on behalf of which they sue and have standing to maintain this action.

(4) Defendant government officials are the principal persons charged with the responsibilities, state and federal, of administering the Act.

(5) Defendant church related colleges and universities are recipients under the Act of grants for construction of academic facilities.

(6) In compliance with the Act and regulations promulgated thereunder, each of the grants in question has been properly approved by the Office of Education of the United States, following proper recommendation by the Connecticut Commission on Aid to Higher Education, such approvals and recommendations having been based upon applications affirmatively demonstrating that the grant in each instance would result in an urgently needed substantial expansion of the institution's student enrollment capacity and would be used solely for construction of secular academic facilities.

(7) The Act authorises the grants made to defendant colleges and universities for construction of academic facilities.

(8) The Act and grants thereunder do not impair plaintiffs' rights under the establishment clause or the free exercise clause of the First Amendment.

(9) The Act and grants thereunder do not discriminate against non-sectarian institutions by depriving them of federal funds in violation of the First and Fourteenth Amendments.

(10) Plaintiffs are not entitled to injunctive relief against defendants.

(11) Defendants are entitled to judgment dismissing the complaint on the merits.

(12) No costs shall be taxed against any party to this action.

Dated at Hartford, Connecticut, this 19th day of March, 1970.

J. JOSEPH SMITH

J. JOSEPH SMITH
United States Circuit Judge

WILLIAM H. TIMBERS

WILLIAM H. TIMBERS
United States District Judge

M. JOSEPH BLUMENFELD

M. JOSEPH BLUMENFELD
United States District Judge

IN THE DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

[Caption omitted in printing]

JUDGMENT

This cause having been heard on its merits before a Three-Judge District Court on December 2, 3, 4 and 5, 1969 and January 22, 1970; and

The Court having filed its opinion, findings of fact and conclusions of law herewith; it is

ORDERED, ADJUDGED and DECREED:

(1) That judgment be, and it hereby is, entered on the merits in favor of defendants, denying all relief sought by plaintiffs and dismissing the complaint.

(2) That no costs shall be taxed against any party to this action.

Dated at Hartford, Connecticut, this 19th day of March, 1970.

/s/ J. Joseph Smith
United States Circuit Judge

/s/ William H. Timbers
United States District Judge

/s/ M. Joseph Blumenfeld
United States District Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Caption omitted in printing]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that the Plaintiffs in the above captioned matter do hereby appeal to the Supreme Court of the United States from the final judgment dismissing the

complaint herein, entered in this action on March 19, 1970. This appeal is taken pursuant to Title 28 of the United States Code, Section 1253.

II. Pursuant to the provisions of Rule 12 (1) of the Supreme Court of the United States, the Clerk is requested to certify and to transmit to the Supreme Court of the United States the entire record of the proceedings herein.

Dated: April 8, 1970

/s/ Leo Pfeffer
Counsel for all Plaintiffs
15 East 84th Street
New York, N. Y. 10028

/s/ Peter L. Costas
Attorney for all Plaintiffs
111 Pearl Street
Hartford, Connecticut 06103

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

[Caption omitted in printing]

STIPULATION AS TO DEFENDANTS ROBERT H. FINCH AND JAMES E. ALLEN, JR.

Plaintiffs and Defendants Robert H. Finch and James E. Allen, Jr., by their counsel, stipulate to the following facts. Counsel for the Plaintiffs and counsel for Defendants Robert H. Finch and James E. Allen, Jr. further agree that their stipulation to the facts set forth below is entered into without prejudice to their right to object to the relevancy or materiality of any fact to be stipulated and in no way limits their right to present at trial, through testimony or documents evidence to explain or provide a context for the facts so stipulated or evidence pertaining to other issues of fact which are relevant to the legal questions in this litigation.

1. Defendant Robert H. Finch is Secretary of Health, Education and Welfare and, in such capacity, has executive responsibility for the operation of federal programs relating to education, *inter alia*. Defendant James E. Allen,

Jr. is Commissioner of Education for the United States (hereinafter referred to as "Commissioner") and is in direct charge of the Office of Education of the United States (hereinafter referred to as "Office of Education"), which directly administers and supervises the operation of various federal programs relating to education and assistance thereof. The Commissioner reports to Secretary Finch.

2. In 1963, the Congress of the United States enacted the Higher Education Facilities Act of 1963, P.L. 88-204 (together with its amendments hereinafter referred to as "the Statute"), which authorized the Commissioner to "* * * carry out a program of grants to institutions of higher education for the construction of academic facilities."

Title I of the Statute provides for grants for construction of academic facilities to be used primarily in connection with undergraduate programs; Title II provides for grants for construction of graduate academic facilities; Title III provides for loans and interest subsidy grants for construction of both graduate and undergraduate academic facilities; and Title IV, *inter alia*, covers general provisions applicable to administration of the foregoing titles.

3. Congress has provided appropriations for grants under Title I for the fiscal years ending June 30, 1964 through June 30, 1969, in the following amounts:

FISCAL YEARS ENDING	AMOUNTS
1964	none
1965	$230,000,000
1966	458,000,000
1967	453,000,000
1968	400,000,000
1969	83,000,000

A portion of the appropriated funds has been earmarked by Congress for the academic facilities at public community colleges and public technical institutes. This earmarked por-

tion was 22 per cent of the appropriated funds for the fiscal years ending before July 1, 1967, 25 per cent of the appropriated funds for the fiscal years ending June 30, 1968, and 60.3 per cent of the appropriated funds for the fiscal years ending thereafter.

4. Title I of the statute requires that a state wishing to participate in the grant program must designate or establish a state agency "which is broadly representative of the public and of institutions of higher education * * *" and the state must submit through such agency a "* * * State plan for such participation * * *". The Commissioner must approve any such plans which meets the conditions set forth in § 105(d) of the Statute, 20 U.S.C. 715(a).

Pursuant to this requirement, the State of Connecticut initially designated the Commission on Cooperation with Federal Authorities in Matters Pertaining to Higher Education and subsequently the Connecticut Commission on Aid to Higher Education (hereinafter referred to as "Connecticut Commission"). State plans have been submitted by such Connecticut Commission and have been approved by the Commissioner.

5. The Commissioner grants funds to institutions of higher education for projects which are approved and recommended by a commission designated by a state and which meet the requirements of the Statute.

Pursuant to the statutory plan of operation, the Connecticut Commission has made recommendations for grants to the Commissioner and these recommendations have been accepted and grants made by the Commissioner except as follows:

a) In the recommendations of the Connecticut Commission for the period closing February 1, 1967, Wesleyan Univeristy was recommended for a partial grant of $122,792 towards the construction of a lecture hall and the mathematics portion of a science center, and Trinity College was recommended for a grant of $500,000 towards the construc-

tion of a physical education facility. Upon review within the Office of Education, it was determined that these projects were not eligible because of the lack of an urgent need for the facilities contemplated; accordingly, these grant applications were denied and the funds therefor were made available for other projects in the State of Connecticut recommended by the Connecticut Commission.

b) In some cases, the Office of Education in its review has identified certain ineligible project costs. This resulted in the approval of an amount less than that recommended by the Connecticut Commission.

6. Section 401(a)(2) of the Statute excludes from eligible facilities, *inter alia*, " * * * (C) any facility used or to be used for sectarian instruction or as a place for religious worship, or (D) any facility which (although not a facility described in the preceding clause) is used or to be used primarily in connection with any part of the program of a school or department of divinity * * *. For the purposes of this subparagraph, the term 'school or department of divinity' means an institution, or a department or branch of an institution, whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation or to prepare them to teach theological subjects."

7. Section 404 of the Statute provides that the Federal interest in a project will expire at the end of twenty years following the completion of the construction which is the subject of the grant. Section 404(b) further provides:

> If, within twenty years after completion of construction of an academic facility which has been constructed in part with a grant or grants under subchapter I or II of this chapter–
>
> (1) the applicant (or its successor in title or possession) ceases or fails to be a public or nonprofit institution, or
>
> (2) the facility ceases to be used as an academic facility, or the facility is used as a facility

> excluded from the term "academic facility" by section 751(a)(2) of this title,
>
> the United States shall be entitled to recover from such applicant (or successor) an amount which bears to the then value of the facility (or so much thereof as constituted an approved project or projects) the same ratio as the amount of such Federal grant or grants bore to the development cost of the facility financed with the aid of such grant or grants.
> * * *

8. The Office of Education has published regulations and other issuance for use by state commissions and for use by applicants. It has also published memoranda, application forms, grant agreement forms and various other forms.

9. A staff is maintained within the Office of Education to prepare various publications and regulations to review applications for grants and the recommendations for grants from the several state commissions, to review state plans and to deal with various other administrative, fiscal and legislative matter.

The present regulations of the Office of Education dealing with the Statute are set forth in Part 170 of Title 45 of the Code of Federal Regulations and were published in the FEDERAL REGISTER, Volume 31, No. 199, on October 13, 1966. A copy of these regulations is appended hereto as Exhibit HEW-1.

The current application form to be utilized by an applicant institution is appended hereto as Exhibit HEW-2 and the current instruction form to be utilized in the preparation of the application is appended hereto as Exhibit HEW-3.

A copy of the current form of grant agreement with a successful applicant institution of higher education is appended hereto as Exhibit HEW-4.

A copy of the current "Terms and Conditions" incorporated in the grant agreement is appended hereto as Exhibit HEW-5.

10. The Office of Education reviews the recommendations of the Connecticut Commission and the applications for grants recommended by the Connecticut Commission. As a result of the recommendations of the Connecticut Commission and such review by the Office of Education, the following grants have been made by the Commissioner under Title I of the Statute to institutions within the State of Connecticut during the period July 1, 1964 through June 30, 1968, inclusive:

INSTITUTION	GRANT
1965 Fiscal Year	
University of Connecticut (Hartford Branch)	$ 520,836
Quinnipiac College	468,204
Willimantic State College	350,000
Annhurst College	277,913
Danbury State College	466,667
University of Hartford	500,000
University of Connecticut	340,521
Total:	2,924,141
1966 Fiscal Year	
Manchester Community College	$ 98,944
Hartford State Technical Institute	500,000
Norwalk Community College	339,596
Thames Valley State Technical Institute	121,645
University of Connecticut	159,479
Fairfield University	500,000
University of Hartford	500,000
Post Junior College Incorporated	372,034
Central Connecticut State College	500,000
Southern Connecticut State College	500,000
Danbury State College	376,667
New Haven College	434,361

Willimantic State College	415,702
Mitchell College	433,333
Albertus Magnus College	24,632
University of Connecticut	342,113
Connecticut College for Women	289,121
Total	5,907,627

1967 Fiscal Year

Manchester Community College	$ 62,039
Thames Valley State Technical Institute	37,246
Waterbury State Technical Institute	244,071
Connecticut College for Women	210,879
Sacred Heart University	367,100
University of Connecticut	545,848
Southern Connecticut State College	586,721
Danbury State College	350,000
Annhurst College	350,697
Trinity College	642,443
Wesleyan University	642,442
University of Bridgeport	642,443
Post Junior College	165,900
University of Connecticut	336,390
University of Hartford	642,443
Total	5,826,662

1968 Fiscal Year

Thames Valley State Technical College	$ 315,189
University of Connecticut	448,080
Central Connecticut State College	500,000
Eastern Connecticut State College	500,000
Fairfield University	242,665
Hartford College for Women	265,182
Mitchell College	21,667
New Haven College	146,666

Southern Connecticut State College	500,000
Western Connecticut State College	500,000
	3,439,339

11. Annual Reports of the Office of Education published with respect to grants made for the fiscal years ending June 30, 1965 through June 30, 1968 are appended hereto as Exhibits HEW-6, HEW-7, HEW-8 and HEW-9. The symbol "P" signifies a public institution and the symbol "N" signifies a non-public institution in the lists compiled as part of the annual reports referred to above.

12. The review form currently used by the Office of Education in the consideration of applications from institutions of higher education for grants under Title 1 is appended hereto as Exhibit HEW-10.

13. A grant under Title I of the Higher Education Facilities Act is not approved unless the Office of Education is satisfied on the basis of its review of each application that the provisions of the Act and Regulations are met. Where necessary or appropriate to the making of this determination, other information supplied by an applicant or otherwise available to the Office of Education is also taken into consideration. A check list form (College Facilities Application Review Form, a copy of which is appended hereto as Exhibit HEW-10) is ordinarily used to facilitate the initial review of the application. The Office of Education approves only applications which indicate that

1. The applicant complies with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and the Regulations of the President issued pursuant thereto (45 CFR Part 80).
2. The application meets the definition of an "institution of higher education" as defined in Section 401(f) of the Act (20 U.S.C. 751(f)). That is:
    a. admits as regular students individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

b. is legally authorized within the State to provide a program of education beyond high school;

c. is a public or other non-profit institution;

d. provides an educational program for which it awards a bachelor's degree; or provides not less than a two-year educational program which is acceptable for full credit toward a degree; or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at semi-professional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

e. is accredited by a nationally recognized accrediting agency or association approved for that purpose by the Commissioner or meets one of the alternatives thereto set forth in § 401(f)(5) (20 U.S.C. 751 (f)(5));

3. The applicant has satisfactorily demonstrated that the area included in a Title I project is 80% or more for undergraduate use or is to be used predominantly for one of the other purposes set forth in § 106 (20 U.S.C. 716, 45 CFR 170.13);

4. There is firm evidence that the project contributes to a substantial expansion of student enrollment capacity or capacity to carry out one of the other purposes set forth in Section 106 (20 U.S.C. 716);

5. Such expansion can be shown to be urgently needed;

6. The areas included in the project are identifiable "academic facilities" as defined in Section 401(a) of the Act. (The cost of constructing those portions of a facility not so identified on account of

the exclusions set forth in § 401(a)(2) are borne by the applicant, and the amount of Federal financial assistance to be provided is determined according to the estimated eligible development cost of the project.) In some cases this involves a determination as to whether facilities will be used for sectarian instruction or whether the institution or department of the institution is an institution or department whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation or to prepare them to teach theological subjects;

7. The applicant has or will have sufficient funds to cover the non-federal share of the project.

In addition to the foregoing, other statutory and regulatory conditions must be met. These conditions relate to such matters as whether a cost is eligible in terms of having been incurred within the proper time period, whether the applicant has available sufficient funds to meet the non-federal share of a project, whether the applicant has a sufficient interest in the site to assure undisturbed use and possession for not less than 75 years, and whether the project or any portion thereof will be of elaborate or extravagant design or materials. In addition, certain assurances are given as to future undertakings of the applicant. These include assurances that the porject will be used only as "academic facilities" during the period of the Federal interest, that the wage rates and other labor standards specified by law will be met, that construction contracts will be let on the basis of competitive bidding, and that the equal employment opportunity provisions of E.O. 11246 will be met.

14. A list of the applications which have been wholly denied by the Commissioner under Title I for failure to meet an eligiblity requirement other than those set forth in § 401(a)(2)(C) and (D), i.e., the so-called "religious exclu-

sion" provisions is appended ereto as Exhibit HEW-11. Few situations arise where a ttal rejection of an application is involved. The schools re identified as to whether they are public (P) or private N); none of them are generally associated with the Roman Catholic Church.

An institution upon reviewg the various materials available to it (the Act, regulation bulletins, application form and instructions) may decide,n its own motion or after an informal conversation or nference with the State Commission or representatives of ıe Office of Education, not to even submit an applicatio on account of a failure to meet some eligibility requirement, or to remove from the project application those area which are ineligible for one or more reasons for support.

Applications which are suhitted to the State Commission are reviewed by it both or completeness and for the purpose of assessing whether ny eligibility questions are raised. An applicant might thdraw its application at this point or substantially modify it solely on the advice of the State Commission, or, in accordance with § 170.14 of the Regulations, a question of eligibility might be forwarded to the Commissioner.

Additionally, an applicati may fail at the State level by virtue of the fact that it not accorded a high enough priority in accordance withhe criteria set forth in the State plan for determining sh priorities to qualify for a portion of the States' allotment. Lists of applications submitted to State Commissiorduring the fiscal year 1969 which fall into this categorye appended hereto as Exhibit HEW-12. The breakdown to the religious group with which a college is affiliated based on information made available to the National Cter for Educational Statistics, U.S. Office of Education.

15. Additional procedur utilized under Title I to insure that facilities constructed vh Federal assistance will not be and are not used for se(rian instruction, religious worship or primarily in connecon with any part of the pro-

gram of a school or department of divinity (as defined in § 401(a)(2) including the following:

A. Advice to applicants

In Part P of each application for Federal assistance under Title I of the Statute (OE Form 1031, appended hereto as Exhibit HEW-2), the institution assures the Untied States Commissioner that:

> "No part of the areas included in the proposed project * * * will be used for sectarian instruction or as a place for religious worship or primarily in connection with any part of the program of a school or department of divinity (as defined in P.L. 88-204 * * *"

The instructions to accompany OE Form 1031 appended hereto as Exhibit HEW-3, for preparation and submission of the application emphasize on page 21 that only academic facilities as defined in the Statute may be included in the project, and identify by direct quotation from the Act those facilities which are specifically excluded from eligibility. The applicant is further cautioned on page 39 of these instructions that:

> "Special attention should be given to Assurance 3(B) [in Part P of the application] to be sure that it is clearly understood that space to be used at *any time* for sectarian or devotional purposes is not eligible assignable area. Such space should, of course, be prorated out of the project. The representations made in applications are incorporated by reference as part of a grant and loan agreement."

B. At the State Level

Prior to determining priorities and Federal shares, a State Commission reviews applications submitted to it for possible questions of eligibility including questions as to whether the facilities covered by the application do or do not qualify as academic facilities on account of the exclusions set forth in § 401(a)(2)(C) and (D). In any case where in the opinion of the State Commission such a question may be

raised, the State Commission forwards a copy of the application to the Office of Education for clarification of such a question.

C. At the Federal Level

The Office of Education, in addition to resolving questions of eligibility forwarded to it by State Commissions, undertakes a detailed review of the application and accompanying plans.

It is at this time that areas of a proposed construction project are identified as to the specific planned use, and any areas identifiable with sectarian instruction or religious worship or as part of the program of a school or department of divinity are classified as ineligible for Federal financial assistance and the amount of the grant or loan to be awarded adjusted accordingly. Similar controls are applied during the review of movable equipment lists, at which time financial assistance is approved for items of equipment to be placed only in eligible areas of the constructon project.

A determination that the institution as a whole is to be characterized as a school of divinity or that the school or department for which the facility is to be constructed should be so characterized will, of course, result in the rejection of the entire application.

Where such may be the case the Office of Education seeks the advice of the Office of the General Counsel except in cases where advice previously given is clearly applicable.

Other legislation administered by the Office of Education contains exclusions similar to those set forth in § 401 (a)(2)(C) and (D). Title II of the Higher Education Act of 1965 which provides grants for the acquisition of library book materials, and Title VI of the Higher Education Act of 1965, which provides grants for equipment (under a State plan procedure similar to that under Title I, Higher Education Facilities Act) are examples of such legislation. (See 20 U.S.C. 1027, 1129). A determination under one of these programs might well involve the same questions and, therefore, be dispositive of an eligibility question in

connection with an application for an award under another program including Title I of the Higher Education Facilities Act.

D. Post-grant review

The Office of Education is now engaged in making a series of on-site reviews of completed projects to verify that conditions under which Federal assistance was provided are being implemented. During these visits, class schedules and course descriptions contained in the school catalog are analyzed to ascertain that nothing in the nature of sectarian instruction is scheduled in any area constructed with the use of Federal funds. If there is found to be an indication that a portion of academic facilities constructed with Federal assistance is used in any way for sectarian purposes, either the questionable practice must be terminated or the institution must assume full responsibility for the cost of constructing the area involved. The latter alternative would result in reduction of the eligible development costs of the project and a proportionate reduction in the amount of Federal funds. Conceivably, such a review could also disclose factors which raise a question as to whether the aided facilities are not in fact being used in connection with the program of a school or department of divinity. Should such a finding be made, an applicant's entitlement to any portion of the grant is open to question.

The following cases represent the few instances where an institution used a facility constructed with Fedeal financial assistance provided under Title I of the Statute for sectarian instruction or religious worship, and illustrate the action taken by the Office of Education to assure compliance with the terms of the statute:

1. In 1965, Oklahoma Christian College, Oklahoma City, Oklahoma, was awarded a grant of $67,692 under Section 104 of Title I of the Statute for construction of a portion of a classroom auditorium facility (Project No. 4-7-00296). The total development cost of the project was $561,974 of which

$203,516 was eligible for participation. A newspaper clipping dated October 19, 1966, which was forwarded to the Office of Education indicated that the College was holding chapel services in its new auditorium. On the basis of follow-up discussions with the College, the Office of Education under letter of April 6, 1967, advised that the College must decide either to discontinue using the facility for religious worship or abandon the grant. On June 29, 1967, the College elected to terminate the grant and to refund such grant funds as had already been received. The grant was officially terminated on November 9, 1967, and the institution paid the final installment of the required refund on April 22, 1968, thus closing the account.

2. A grant of $86,863 was made in 1965 under Section 104 of Title I of the Statute to Ohio Valley College, Parkersburg, West Virginia, for construction of a library and general purpose classroom addition to an existing building. A Title III loan of $110,000 was also made. The general purpose classroom was essentially a small auditorium with movable partitions for subdividing it into several classrooms. The total development cost of the project was $263,108 with an eligible development cost of $260,591. The College scheduled daily chapel services in the auditorium and conducted courses in homiletics in the classrooms. Both uses are contrary to Section 401(a)(2)(C) of the Act. The question of compliance with restrictions on the use of academic facilities constructed with Federal financial assistance was brought to the attention of the Office of Education by the General Accounting Office which noted such use during the course of a routine on-site inspection which took place in April, 1968. The Office of Education by letter dated May 21, 1968 advised the College to discontinue the ineligible use or relinquish so much of the grant and loan as is attributable to such space. The college decided in October, 1968, to build a new chapel and to discontinue the ineligible use of the portion

of the facilities constructed with Federal assistance, thus retaining the full grant and loan.

3. On February 28, 1969, a representative of the Office of Education visited Millsaps College, Jackson, Mississippi, for the purpose of verifying that conditions under which a grant of $74,095 made in 1965 under Section 104 of Title I of the Statute for the renovation of an existing classroom-auditorium building were being met. During the visit the Office of Education representative discussed the College officials restrictions on the use of facilities constructed with Federal financial assistance. The review disclosed that two courses–The History of Methodism and the Organization of the Church–were being conducted in these facilities. The Office of Education advised by letter dated May 6, 1969, that the College should decide whether to transfer all instruction of a sectarian nature to other than project facilities, or to remove from the project those areas in which sectarian instruction is involved and refund to the Federal Government the portion of the grant funds already received. On May 22, 1969, the College agreed to transfer, such instruction to non-federally supported facilities and to comply in the future with the statutory restrictions as to use. The Office of Education accepted the assurance contained in the letter and so advised the institution on June 6, 1969.

16. The following institutions (or departments within institutions) are among those which have been determined under the identified program administered by the Office of Education, to be schools or departments of divinity. In some cases this conclusion is reached because the institution has not submitted information sufficient to make a determination that any facilities, books, equipment or fellowships for that institution or department would not be used primarily in connection with any part of the program of a school or department of divinity. Catholic Schools are designated (RC).

A. Under Title I of the Statute of 1963 (grants for construction of academic facilities; 20 U.S.C. 711).

1. Concordia College, Texas - Preparation for religious vocation.
2. College of Liberal Arts, Jewish University of America, Ill. - Preparation for ministry, and for a religious vocation.
3. Maryglade College, Mich. (RC) - Preparation ofr ministry and for a religious vocation.
4. St. Charles, College, Md. (RC) - Preparation for the ministry and preparation for a religious vocation.
5. St. Charles Borromeo Seminary, Pa. (RC) - Preparation for the ministry.

B. Under Title III of the Statute (Loans for construction of academic facilities; 20 U.S.C. 741).

6. Sacred Heart Junior College, Pa. (RC)
7. Blessed Sacrament College, Pa. (RC)

Both of these institutions (6 and 7) prepare students for a religious vocation.

C. Under Title VI-A of the Higher Education Act of 1965 (Equipment Grants; 20 U.S.C. 1121)

8. Both Jacobs Hebrew Teachers College, N.Y.
9. Hebrew Teachers College, Mass.

Both of these institutions (8 and 9) prepare students to teach theological subjects.

10. Concordia Collegiate Institute, N.Y.
11. Concordia Senior College, Ind.
12. Concordia Teachers College, Ill.
13. Concordia Teachers College, Neb.
14. St. Paul's College, Mo.

These institutions (10 thru 14) are all members of Lutheran Church, Missouri Synod—all prepare students to enter religious vocations.

D. Under Title II of the Higher Education Act of 1965 (Grants for Library books and materials; 20 U.S.C. 1021).

15. Felician College, Ill. (RC)

16. Our Lady of Mercy, Calif. (RC)

Both of these institutions (15 and 16) prepare students to enter upon a religious vocation.

E. Under Title IV of the National Defense Education Act of 1958 (Fellowship for those preparing to become teachers; 20 U.S.C. 462).

17. Columbia University (Department of Religion)

18. Duke University (Graduate Department of Religion)

19. Harvard University (Department of Comparative Religion)

20. Yale University (Department of Religious Studies)

Fellowships for study in these departments (17 thru 20) would be preparing students to teach theological subjects.

F. Under one or more of the foregoing acts.

18. Northwest College of the Assembles of God, Wash. - Preparation for the ministry and for a religious vocation.

17. The plaintiffs are citizens of the United States, residents of Connecticut and taxpayers.

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James E. Allen, Jr.

Portions of Exhibit 2 to stipulation

P. ASSURANCES AND AUTHENTICATION

1. OF ASSURANCE OF COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 (FORM HEW 441) COVERING THE INSTITUTION OR BRANCH CAMPUS FOR WHICH THIS APPLICATION IS SUBMITTED (CHECK AND COMPLETE (a) IF THE ASSURANCE HAS BEEN ASSIGNED A NUMBER, AND (b) ONLY IF THE ASSURANCE NUMBER IS NOT YET KNOWN):

☐ (a) HAS BEEN ASSIGNED ASSURANCE NUMBER _____

☐ (b) WAS FILED WITH THE U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE ON _____ (DATE), 19__.

2. ALL PARTS AND EXHIBITS CONTAINED IN OR REFERRED TO IN THE APPLICATION FORM ARE SUBMITTED HEREWITH AND MADE A PART OF THIS APPLICATION.

3. THE APPLICANT HEREBY ASSURES THE UNITED STATES COMMISSIONER OF EDUCATION THAT:

(a) IF THIS APPLICATION IS APPROVED, THE CONSTRUCTION DESCRIBED HEREIN WILL BE UNDERTAKEN PROMPTLY AND IN AN ECONOMICAL MANNER AND WILL NOT BE OF ELABORATE OR EXTRAVAGANT DESIGN OR MATERIALS;

(b) NO PART OF THE SPACE INCLUDED IN THE PROPOSED PROJECT: (1) IS INTENDED PRIMARILY FOR EVENTS FOR WHICH ADMISSION IS TO BE CHARGED TO THE GENERAL PUBLIC; (2) IS ESPECIALLY DESIGNED FOR ATHLETIC OR RECREATIONAL ACTIVITIES OTHER THAN FOR AN ACADEMIC COURSE IN PHYSICAL EDUCATION; (3) WILL BE USED FOR SECTARIAN INSTRUCTION OR AS A PLACE FOR RELIGIOUS WORSHIP OR PRIMARILY IN CONNECTION WITH ANY PART OF THE PROGRAM OF A SCHOOL OR DEPARTMENT OF DIVINITY (AS DEFINED IN P.L. 88-204); OR (4) WILL BE USED BY A "SCHOOL OF MEDICINE," "SCHOOL OF DENTISTRY," "SCHOOL OF OSTEOPATHY," "SCHOOL OF PHARMACY," "SCHOOL OF OPTOMETRY," "SCHOOL OF PODIATRY," OR "SCHOOL OF PUBLIC HEALTH" AS THESE TERMS ARE DEFINED IN SECTION 799 OF THE PUBLIC HEALTH SERVICE ACT, OR BY A "SCHOOL OF NURSING" AS DEFINED IN THAT ACT UNDER SECTION 820;

(c) ALL FACILITIES INCLUDED IN THE PROPOSED PROJECT WILL BE USED AS ACADEMIC FACILITIES DURING AT LEAST THE PERIOD OF THE FEDERAL INTEREST OR FOR SO LONG AS THE GOVERNMENT HOLDS ANY OF THE BONDS PURSUANT TO A TITLE III LOAN, WHICHEVER IS LONGER;

(d) ANY FEDERAL FUNDS RECEIVED PURSUANT TO THIS APPLICATION WILL BE USED SOLELY FOR DEFRAYING THE DEVELOPMENT COST OF THE PREFERRED PROJECT;

(e) THE APPLICANT HAS ON HAND, OR IS ASSURED OF OBTAINING, IF THE APPLICATION IS APPROVED, SUFFICIENT FUNDS TO MEET THE NON-FEDERAL PORTION OF THE COSTS OF CONSTRUCTING THE FACILITIES DESCRIBED HEREIN, AND THE APPLICANT WILL COVER ALL COSTS IN EXCESS OF THE AMOUNT PROVIDED FOR IN THE APPLICATION.

(f) CONSTRUCTION CONTRACTS FOR THE CONSTRUCTION COVERED BY THE APPLICATION WILL: (1) PROVIDE THAT LABORERS AND MECHANICS EMPLOYED BY CONTRACTORS AND SUBCONTRACTORS IN THE PERFORMANCE OF WORK ON CONSTRUCTION OF THE FACILITIES BE PAID WAGES AT RATES NOT LESS THAN THOSE PREVAILING ON SIMILAR CONSTRUCTION IN THE LOCALITY AS DETERMINED BY THE SECRETARY OF LABOR IN ACCORDANCE WITH THE DAVIS-BACON ACT, AS AMENDED (40 U.S. C. 276a-276a-5), AND WILL RECEIVE OVERTIME COMPENSATION IN ACCORDANCE WITH AND SUBJECT TO THE PROVISIONS OF THE CONTRACT WORK HOURS STANDARDS ACT (P.L. 87-581), UNLESS A WAIVER IS GRANTED BY THE COMMISSIONER PURSUANT TO SECTION 408(a) OF THE ACT; (2) INCLUDE, AND PROVIDE FOR THEIR INCLUSION IN SUBCONTRACTS, ALL APPLICABLE PROVISIONS REGARDING EQUAL EMPLOYMENT OPPORTUNITY PURSUANT TO EXECUTIVE ORDER 11246; (3) PROVIDE THAT THE CONTRACTOR SHALL FURNISH A PERFORMANCE BOND IN THE AMOUNT OF THE CONTRACT PRICE AND A PAYMENT BOND IN THE AMOUNT OF AT LEAST ONE-HALF OF THE CONTRACT PRICE, UNLESS OTHERWISE AGREED TO BY THE COMMISSIONER IN THE CASE OF SMALL JOBS, AND THAT THE CONTRACTOR SHALL PROVIDE WORKMEN'S COMPENSATION, AND ADEQUATE FIRE, PUBLIC LIABILITY AND PROPERTY DAMAGE INSURANCE (UNLESS THE APPLICANT MAKES OTHER ARRANGEMENTS FOR ANY OR ALL SUCH INSURANCE); (4) PROVIDE FOR THE MAINTENANCE OF SUCH RECORDS AND COMPLY WITH SUCH OTHER PROCEDURES AS THE COMMISSIONER FINDS NECESSARY TO CARRY OUT HIS RESPONSIBILITIES IN CONNECTION WITH THE IMPLEMENTATION OF THE DAVIS-BACON ACT, AND THE CONTRACT WORK HOURS STANDARDS ACT; AND (5) PROVIDE THAT REPRESENTATIVES OF THE U.S. OFFICE OF EDUCATION AND SUCH OTHER PERSONS AS THE COMMISSIONER MAY DESIGNATE WILL HAVE ACCESS AT ALL REASONABLE TIMES TO WORK WHEREVER IT IS IN PREPARATION OR PROGRESS, AND THE CONTRACTOR WILL PROVIDE PROPER FACILITIES FOR SUCH ACCESS AND INSPECTION;

(g) APPROVAL OF THE FINAL WORKING DRAWINGS AND SPECIFICATIONS FOR THE PROPOSED CONSTRUCTION WILL BE OBTAINED FROM THE COMMISSIONER AND THE ASSURANCE OF THE COMMISSIONER WILL BE OBTAINED BEFORE THE CONSTRUCTION COVERED BY THIS APPLICATION IS ADVERTISED FOR BIDDING;

(h) ALL CONTRACTING FOR NEW CONSTRUCTION, AND FOR REHABILITATION, REMODELING, REMODELING, CONVERSION, OR IMPROVEMENT OF EXISTING STRUCTURES, AND FOR ACQUISITION AND INSTALLATION OF BUILT-IN EQUIPMENT NOT COVERED BY GENERAL CONSTRUCTION CONTRACTS, SHALL BE ON A FIXED PRICE BASIS. ALL SUCH CONSTRUCTION CONTRACTS SHALL BE AWARDED ON THE BASIS OF COMPETITIVE BIDDING OBTAINED BY PUBLIC ADVERTISING;

(i) NO CHANGES WILL BE MADE THAT WILL CAUSE THE PROJECT TO BE SUBSTANTIALLY DIFFERENT FROM THE REPRESENTATIONS MADE IN THE APPLICATION WITHOUT PRIOR APPROVAL FROM THE COMMISSIONER.

CONTINUED ON PAGE 11

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P. ASSURANCES AND AUTHENTICATION (CONTINUED)

(J) ARCHITECTURAL OR ENGINEERING SUPERVISION AND INSPECTION WILL BE PROVIDED AT THE CONSTRUCTION SITE TO INSURE THAT THE COMPLETED WORK CONFORMS TO THE APPROVED PLANS AND SPECIFICATIONS;

(K) IT IS FULLY COGNIZANT OF THE REQUIREMENTS REGARDING ECONOMICAL METHODS OF PURCHASE OF MOVABLE EQUIPMENT IN ACCORDANCE WITH SOUND BUSINESS PRACTICE, AS SET FORTH IN THE APPLICABLE REGULATIONS (45 CFR 170.4), AND ALL MOVABLE EQUIPMENT, THE COST OF WHICH IS TO BE CHARGED TO THE PROJECT, WILL BE PROCURED IN ACCORDANCE WITH SUCH REGULATIONS. IT IS UNDERSTOOD AND AGREED BY THE APPLICANT THAT THE ELIGIBLE PROJECT DEVELOPMENT COST AND THE FEDERAL GRANT OR LOAN AMOUNT MAY BE REDUCED AT SETTLEMENT BY THE COMMISSIONER BASED ON THE AMOUNT OF ANY COSTS CLAIMED UNDER THE PROJECT WHICH ARE FOR ELABORATE OR EXTRAVAGANT EQUIPMENT ITEMS OR WHICH CANNOT BE VERIFIED TO HAVE BEEN INCURRED IN ACCORDANCE WITH THIS ASSURANCE;

(L) ADEQUATE AND SEPARATE ACCOUNTING AND FISCAL RECORDS, AND ACCOUNTS OF ALL MONEYS PROVIDED FROM ANY SOURCE TO PAY THE COST OF THE PROPOSED CONSTRUCTION (INCLUDING NECESSARY SITE ACQUISITION, AND EQUIPMENT); WILL BE MAINTAINED, AND AUDIT OF SUCH RECORDS AND ACCOUNTS WILL BE PERMITTED AT ANY REASONABLE TIME. ALL SUCH RECORDS, INCLUDING ACCOUNTING RECORDS, BANK DEPOSIT SLIPS, CANCELED CHECKS, AND OTHER SUPPORTING DOCUMENTS AND CONTRACT AWARDS AND PURCHASE ORDERS (OR MICROFILM COPIES THEREOF) SHALL BE RETAINED INTACT BY THE APPLICANT, OR WHERE APPLICABLE, BY THE APPLICANT'S BUILDING AGENCY, FOR AUDIT OR INSPECTION BY AUTHORIZED REPRESENTATIVES OF THE FEDERAL GOVERNMENT FOR A PERIOD OF THREE (3) YEARS AFTER COMPLETION OF THE PROJECT OR UNTIL THE APPLICANT IS NOTIFIED OF COMPLETION OF THE GOVERNMENT'S AUDIT (INCLUDING RESOLUTION OF ANY EXCEPTIONS), WHICHEVER SHALL OCCUR FIRST;

(M) UNLESS EXPRESSLY AGREED TO BY THE COMMISSIONER, IT WILL NOT DISPOSE OF OR ENCUMBER ITS TITLE OR LEASEHOLD OR OTHER INTEREST IN THE SITE AND THE FACILITIES DURING THE PERIOD OF FEDERAL INTEREST OR FOR SO LONG AS THE GOVERNMENT HOLDS ANY BONDS PURSUANT TO A TITLE III LOAN, WHICHEVER IS LONGER;

(N) IT WILL FURNISH PROGRESS REPORTS AND SUCH OTHER INFORMATION RELATING TO THE PROPOSED CONSTRUCTION AND THE GRANT OR LOAN AS THE COMMISSIONER MAY REQUIRE;

(O) IT IS UNDERSTOOD AND AGREED THAT THE COMMISSIONER MAY, FROM TIME TO TIME, AFTER EXECUTION OF A LOAN OR GRANT AGREEMENT FOR THIS PROJECT, AND PRIOR TO FINAL SETTLEMENT UNDER THE GRANT OR LOAN AGREEMENT, MAKE COMPARD AMENDMENTS IN THE GRANT AND/OR LOAN AMOUNT TO ADJUST TO A REDUCTION IN THE COST OF THE FACILITIES, THE IDENTIFICATION OF INELIGIBLE COSTS, OR A REDUCTION IN THE SIZE OF THE PROJECT; AND,

(P) THAT IT HAS REVIEWED THE ASSUMED AND FINANCIAL REQUIREMENTS FOR OPERATION OF THE FACILITIES UPON THEIR COMPLETION, AND CONSIDERS THE PLAN FOR OPERATION OF THE FACILITIES TO BE PRACTICAL AND WITHIN THE FINANCIAL CAPABILITIES OF THE INSTITUTION.

4. THE UNDERSIGNED HEREBY CERTIFIES THAT THE APPLICANT POSSESSES LEGAL AUTHORITY TO APPLY FOR FEDERAL ASSISTANCE UNDER THE ACT, AND TO FINANCE AND CONSTRUCT THE PROPOSED FACILITIES; THAT A RESOLUTION, MOTION OR SIMILAR ACTION HAS BEEN DULY ADOPTED OR PASSED AS AN OFFICIAL ACT OF THE APPLICANT'S GOVERNING BOARD, AUTHORIZING THE FILING OF THIS APPLICATION, INCLUDING ALL UNDERSTANDINGS AND ASSURANCES CONTAINED HEREIN, AND DIRECTING AND AUTHORIZING THE UNDERSIGNED TO ACT AS THE OFFICIAL REPRESENTATIVE OF THE APPLICANT IN CONNECTION WITH THIS APPLICATION AND TO PROVIDE SUCH ADDITIONAL INFORMATION AS MAY BE REQUIRED; THAT IN FILING THE APPLICATION THE APPLICANT IS FULLY COGNIZANT OF THE CONDITIONS UNDER WHICH FEDERAL FUNDS ARE MADE AVAILABLE UNDER THE HIGHER EDUCATION FACILITIES ACT OF 1963, AS SET FORTH IN THIS APPLICATION FORM AND THE ACCOMPANYING INSTRUCTIONS AND REGULATIONS; AND THAT ALL INFORMATION AND STATEMENTS CONTAINED IN THIS APPLICATION AND THE ATTACHED SUPPORTING DOCUMENTS ARE TRUE AND CORRECT TO THE BEST OF HIS KNOWLEDGE AND BELIEF.

(TITLE I ONLY)

5. THIS APPLICATION IS FILED FOR CONSIDERATION FOR A GRANT DURING THE FEDERAL FISCAL YEAR ENDING JUNE 30, _____ (YEAR). IT IS UNDERSTOOD THAT IF THE APPLICATION IS NOT RECOMMENDED BY THE STATE COMMISSION FOR A GRANT DURING THE FISCAL YEAR, A NEW APPLICATION WILL BE REQUIRED TO BE FILED IF THE APPLICANT WISHES THE PROJECT TO BE CONSIDERED FOR A GRANT DURING THE SUBSEQUENT FISCAL YEAR.

LEGAL NAME OF APPLICANT	ADDRESS OF APPLICANT (INCLUDE ZIP CODE)	
SIGNATURE OF AUTHORIZED OFFICER	ADDRESS OF AUTHORIZED OFFICER (IF DIFFERENT THAN ABOVE)	
TYPED NAME AND TITLE OF AUTHORIZED OFFICER	DATE OF APPLICATION	TELEPHONE NUMBER OF AUTHORIZED OFFICER AREA CODE / TELEPHONE NUMBER AND EXTENSION

Exhibit 4 to Stipulation

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF EDUCATION

BUREAU OF HIGHER EDUCATION
GRANT AGREEMENT
Higher Education Facilities Act

PROJECT NO.

Dear

Your application for a grant under the Higher Education Facilities Act of 1963, to assist in the construction of the academic facilities described below, is hereby approved.

The essential data concerning the approved grant are as follows:

LEGAL APPLICANT

INSTITUTION OR BRANCH CAMPUS

PROJECT

DATE OF APPLICATION	TITLE OF ACT	SPECIAL TERMS AND CONDITIONS	GRANT AMOUNT
	☐ TITLE I ☐ TITLE II	☐ NONAPPLICABLE ☐ APPLICABLE, DATED	$

This grant has been approved on the basis of the representations and assurances made in your application for a grant, dated as indicated above. The grant is subject to the Enclosed Terms and Conditions dated December 1967, and to such Special Terms and Conditions as may be indicated above, which are hereby made a part of this Agreement. Should the Commissioner find that any representation made in connection with the aforementioned application is incomplete or incorrect in any material respect or that for any reason there has been a failure to comply with any of the Terms and Conditions subject to which the grant is approved, or that the purposes for which the grant is made have not been or will not be achieved, notwithstanding any other provision of this Agreement, the Commissioner reserves the right to take such action as he deems necessary or appropriate to protect the interest of the government, including refusing to make any disbursement of funds and requiring the return of all or part of any funds that have already been disbursed.

This grant may be subject to termination if the facilities covered by the grant are not placed under construction, or under contract for construction, within eighteen months of the date of this letter.

Also enclosed are two copies of the approved project summary, one copy for your records and one for the architect. The project summary provides data concerning the facilities development cost, the eligible project development cost, and the facilities financing plan, as approved. The enclosed information sheet contains instructions regarding necessary clearances and other required actions in the development of the facilities.

Please indicate your receipt of this Agreement, and your understanding of the Terms and Conditions subject to which the grant is approved, by signing and returning the second copy of this letter.

Enclosures

Sincerely,

OE FORM 1054 (REV. 11-67)

APPLICANT COPY - 1

[Portions of Exhibit 12 to Stipulation.]

NUMBER AND AMOUNT OF GRANTS
BY TYPE OF INSTITUTION
FOR FISCAL YEAR 1969
UNFUNDED PROJECT APPLICATIONS

TYPE OF INSTITUTION	NO. OF UNFUNDED APPLICATIONS	AMOUNT OF GRANTS
Four-Year Public	68	$34,451,374
Two-Year Public	41	30,235,645
Private Independent	24	13,211,250
Roman Catholic	9	4,520,636
Private Other Denomination	34	10,889,539
TOTAL	176	$93,306,444

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

[Caption omitted in printing]

SUPPLEMENTAL STIPULATION AS TO DEFENDANTS ROBERT H. FINCH AND JAMES E. ALLEN, JR.

Plaintiffs and Defendants Robert H. Finch and James E. Allen, Jr., by their counsel, stipulate to the following facts. Counsel for the Plaintiffs and counsel for Defendants Robert H. Finch and James E. Allen, Jr. further agree that their stipulation to the facts set forth below is entered into without prejudice to their right to object to the relevancy or materiality of any fact so stipulated and in no way limits their right to present at trial, through testimony or documents, evidence to explain or provide a context for the facts so stipulated or evidence pertaining to other issues of fact which are relevant to the legal questions in this litigation.

18. Albertus Magnus College submitted an application which was transmitted by the Connecticut Commission to the Office of Education for a grant for construction of academic facilities to be located in a general academic building containing classrooms, faculty and administrative offices, faculty seminar room, student study area, language laboratories and adjoining offices and necessary related service and maintenance facilities. The grant was requested for construction of two language laboratories and adjoining offices and necessary related service facility in the general academic building. This application was approved by the Office of Education. A copy of said application, with omissions, is appended hereto as exhibit HEW-13.

13. Annhurst College submitted an application which was transmitted by the Connecticut Commission to the Office of Education for a grant for construction of a new music, drama and arts building with an auditorium to be used for general academic programs. This application was approved by the Office of Education. A copy of said application, with omissions, is appended hereto as exhibit HEW-14.

20. Fairfield University submitted an application which was transmitted by the Connecticut Commission to the Office of Education for a grant for construction of facilities in a new science building to house the biology, chemistry, mathematics and physics departments, the computer instructional and research division and some biology-related functions of the psychology department. The grant requested was for construction of the science building minus the computer facilities. This application was approved by the Office of Education. A copy of said application, with omissions, is appended hereto as exhibit HEW-15.

21. Fairfield University also submitted an application which was transmitted by the Connecticut Commission to the Office of Education for a grant for a new library building. This application was approved by the Office of Educa-

tion. A copy of said application, with omissions, is appended hereto as exhibit HEW-16.

22. Sacred Heart University submitted an application which was transmitted by the Connecticut Commission to the Office of Education for a grant for construction of a new library. This application was approved by the Office of Education. A copy of said application, with omissions, is appended hereto as exhibit HEW-17.

/s/ Peter L. Costas
Attorney for Plaintiffs
111 Pearl Street
Hartford, Connecticut 06103

/s/ William D. Ruckelshaus
Assistant Attorney General

/s/ Stewart H. Jones
United States Attorney

/s/ Harland F. Leathers

/s/ Jeffrey F. Axelrad

Attorneys, Department of Justice
Washington, D.C.
Attorneys for Defendants
Robert H. Finch and
James E. Allen, Jr.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Caption omitted in printing]

STIPULATION AS TO MARVIN K. PETERSON, CHAIRMAN OF THE CONNECTICUT COMMISSION ON AID TO HIGHER EDUCATION

Plaintiffs and Defendant Marvin K. Peterson, Chairman of the Connecticut Commission on Aid to Higher Education, by their counsel, stipulate the following facts:

1. In 1964, Governor John Dempsey created the Commission on Cooperation with Federal Authorities in Matters Pertaining to Higher Education pursuant to executive order.

This Commission was to implement the Statutory role in the allocation and distribution of funds under Title I of the Higher Education Facilities Act of 1963, PL 88-204. In 1966, Governor Dempsey designated the State Commission to act as the agency of the State of Connecticut in implementing the State's participation in programs under Titles I and VI A of the Higher Education Act of 1965, PL 89-329.

2. In 1967, the Legislature of the State of Connecticut enacted Public Act 585 which gave the Commission agency status and changed its name to the Connecticut Commission on Aid to Higher Education.

3. The members initially appointed to the Commission in 1964 were William J. Sanders, Secretary of the State Board of Education; George J. Conkling, State Commissioner of Finance and Control; Homer D. Babbidge, Jr., President of the University of Connecticut; Marvin K. Peterson, President of New Haven College; Rev. James E. Fitzgerald, President of Fairfield University; Vincent B. Coffin, Chancellor of the University of Hartford; Burton C. Hallowell, Vice President for Development and Professor of Economics at Wesleyan University; David B. H. Martin, special Assistant on Government Relations to the President and to the Provost of Yale University; and William H. Curtis, Superintendent of Schools in Manchester. The present members of the Commission are as follows: Marvin K. Peterson, President of New Haven College, Chairman of the Commission; Frederick W. Lowe, Jr., President of Manchester Community College, Vice-chairman of the Commission; George J. Conkling, State Commissioner of Finance and Control, Secretary of the Commission; Homer D. Babbidge, Jr., President of the University of Connecticut; William H. Conley, President of Sacred Heart University; ruth A. Haas, President of Western Connecticut State College; Warren G. Hill, Director of the Commission for Higher Education; David B. H. Martin, a citizen member; Howard B. Matthews, Vice President and Treasurer of Wesleyan University; William J. Sanders, Secretary of the State Board of

education; Mrs. Ruth V. Vogt, a housewife from New London; and Archibald M. Woodruff, Chancellor of the University of Hartford.

4. The Commission in 1964 adopted a State Plan under Title I of the Higher Education Facilities Act pursuant to the requirement of the U.S. Department of Health, Education and Welfare. Such state plan was approved by the U.S. Commissioner of Education in 1964 and the Commission then began to consider applications for grants under Title I of the Higher Education Facilities Act of 1963.

5. In accordance with the procedures of the Commission, applications for grant are received from institutions of higher learning throughout the State of Connecticut on forms provided by the U.S. Commissioner of Education. The Commission employs a staff which reviews these applications to determine that they are in compliance with the requirements of the U.S. Commissioner of Education and with the requirements of the State Plan adopted with respect to Federal Higher Education Facilities Act of 1963. Copies of the complete application and of correspondence relating thereto are maintained in the offices of the State Commission. Upon determination that an application from an institution meets the criteria for eligiblity, various factors set forth in the State Plan are then considered with respect to the institution and the proposed subject matter of the grant. These factors provide a basis for evaluating the need for the facilities in question and the benefits to be afforded thereby to the institution and potential students in order to attain the overall facilities goal of the State of Connecticut as enunciated in the State Plan adopted by the Commission.

The criteria for the scoring of the several institutions are broken into two categories (a) Required Criteria and (b) Optional Criteria. Required criteria include (1) future enrollment increase numerical and percentage), (2) facilities increase (numerical and percentage), and (3) utilization of

facilities (capacity/enrollment ratio, average weekly use of classrooms, average weekly use of lab). A sheet showing the weighting given the several factors is appended hereto as Exhibit 1.

In the event of ties in the scores of two or more institutions, the first tie breaker is the combined score of percentage and numerical future enrollment increase. The second tie breaker is the numerical increase in undergraduate enrollment to be expected by the third fall term after the fall term which preceded the closing date for the application. The third tie breaker is the net increase in assignable area of instructional and library facilities to be provided by the project.

In accordance with the provisions of Title I of the Higher Education Facilities Act of 1963, the maximum amount payable for any one project under Section 104 of the Act had been 1/3 of the amount of the eligible development costs; this Title was amended by Congress effective in fiscal 1969 so that the maximum amount payable was 1/2 the eligible development costs. In addition to the aforementioned percentage ceiling established by the federal Statutes, the State Commission adopted an initial maximum of $500,000 payable for any one project, with a provision that, if funds remained available under the State's allocation after recommendations had been made for grants to all eligible projects, then an institution might be granted a sum in excess of $500,000, up to the maximum authorized by the federal Statutes. In 1966, the State Plan was revised to provide an initial maximum dollar amount per grant of $350,000.

With respect to public community colleges and public technical colleges, the percentage figures are respectively 40 percent and 50 percent of the eligible development cost. Although no dollar limit was initially established for projects at such colleges, the State Commission in 1965 adopted a dollar limit of $500,000 and this dollar amount was later reduced for the fiscal year 1969 to $350,000.

In the event that a college does not receive a grant during one closing period for an otherwise eligible project, the application for a grant as to that project is carried forward to the next closing period if it is within the fiscal year, or returned to the applicant if the next closing period is in another fiscal year. If the institution receives only a partial grant, it may submit supplementary application for the eligible balance in any closing periods held before the project is substantially completed. If an institution has had an application returned, it must submit a new application in order to be considered again.

6. Pursuant to this plan of operation, the staff of the Commission has scored the applications received from the various institutions of higher learning in each closing period and has presented tally sheets to the Commission indicating the names of the institutions, their total score, and the amount of the grants to be recommended which might be only partial amounts or nothing, depending upon the grants made to higher scoring institutions and the state allocation. Copies of the tally sheets for the several closing periods are appended hereto as Exhibits 2-8. All grant applications received from institutions of higher learnings within the State of Connecticut which were completed and which were found to be eligible for consideration pursuant to the Higher Education Facilities Act of 1963 are set forth in the appended tally sheets.

7. The Commission has recommended grants to the U.S. Commissioner of Education in accordance with the amounts indicated on the tally sheets, Exhibits 2-8.

8. In the period closing January 15, 1965 (Exhibit 2), Albertus Magnus College was eligible for a grant of $24,632; Wesleyan University and Trinity were each eligible for a grant in the amount of $500,000 but none of these three institutions was recommended for a grant. The University of Connecticut was eligible for a grant in the amount of $500,000 but was recommended for a partial grant of $340,521 which represented the amount remaining in the

State's allocation from the United States Office of Education after recommendation of maximum grants to the higher scoring institutions. With respect to the application from the University of Connecticut, the Commission subsequently recommended a supplementary grant of $159,479 in the ensuing year to provide the maximum eligible amount of $500,000. With respect to the application from Albertus Magnus College, a grant of $24,632 was recommended by the Commission in the fiscal year 1966. The application submitted in fiscal year 1965 by Wesleyan University was again considered in fiscal year 1966 and again not recommended for grant because of a low score relative to other institutions. A new application from Trinity College for the same project was submitted in fiscal year 1966 and again was not favorably considered because of a low score. A new application for the same project at Trinity College was submitted in fiscal year 1967 and recommended for a grant in the amount of $500,000.

9. In the period closing January 14, 1966 (Exhibit 3), the Music and Art Building Project at Connecticut College was recommended for only a partial grant because of its low score which put it in a position where recommendations to higher scoring institutions used the bulk of available allocation. Connecticut College subsequently received an increase in the partial grant because of reallocation of funds to Connecticut so that the total amount received for the fiscal year 1966 was $312,125. Connecticut College submitted an application for a supplemental grant for fiscal year 1967 and was recommended for an additional grant of $187,875 to provide the maximum of $500,000. The library project of Connecticut College and the projects of Trinity College and Wesleyan University were not recommended for grants because of the low scores of the projects. As stated in Paragraph 8 above, Trinity College filed a new application and did receive a grant for the period closing November 15, 1966. The Connecticut College library project did not subsequently receive a federal grant, nor did

the Wesleyan University project as indicated hereinbefore in Paragraph 8.

10. For the period closing November 15, 1966 (Exhibit 4), grants were made to all eligible institutions up to the maximum amounts eligible under the State Plan.

11. For the period closing February 1, 1967 (Exhibit 5), Wesleyan University, which was eligible for a grant of $500,000, was recommended for a partial grant of only $123,092 because of the exhaustion of the State's allocation by recommendations for grants to higher scoring institutions. Trinity College was recommended for a grant of $500,000. Subsequently, the United States Office of Education determined that the projects of Trinity College and Wesleyan University were not eligible because of lack of urgent need for the type of facilities contemplated and these applications were then denied. After the determination of ineligiblity, the amount of $623,093 was then reallocated by the State Commission to the projects at Southern Connecticut State College, University of Connecticut, Trinity College and Wesleyan University referred to in the tally sheet for the period closing November 15, 1966 and the projects of the University of Bridgeport and University of Hartford referred to in the tally sheet for the period closing February 1, 1967.

12. For the period closing November 15, 1967 (Exhibit 6), Fairfield University received only a partial grant of $242,665 although it was eligible in the amount of $500,000, because of exhaustion of the state allocation in recommendations for grants to higher scoring institutions. The projects of the University of Connecticut and the University of Hartford received no funds because of exhaustion of the State's allocation. The project of the University of Connecticut was considered subsequentiy with the applications for the period closing November 15, 1968 and subsequently received a recommendation for a grant in the amount of $350,000. The application for the project of the University of Hartford was not resubmitted.

13. For the period closing November 15, 1968 (Exhibit 7), grants were made to all eligible institutions up to the maximum amounts eligible under the State Plan.

14. For the period closing February 1, 1969 (Exhibit 8), Wesleyan University was recommended for a partial grant in the amount of $264,022 because of the exhaustion of allocated funds for the fiscal year.

15. According to the information at hand, the United States Commissioner of Education has accepted the recommendations of the State Commission and made grants in all instances except for the projects of Wesleyan University and Trinity College recommended for the period closing February 1, 1967.

16. The Commission and members thereof have had occasion to consider questions raised concerning the Constitutionality of grants to church related institutions on at least several occasions. Portions of the minutes of meetings of the Commission reflecting such consideration are appended hereto as Exhibits 9-13.

17. The Commission has not adopted any supplemental guidelines or requirements directed to applying institutions with respect to hiring policies or with respect to enrollment policies so as to ensure that no discriminatory practices are employed. Counsel for the Commission wishes to note that he is of the opinion that the Commission has no authority to adopt further guidelines and points out that the application supplied by the U.S. Commissioner of Education requires the college to indicate that it complies with Title VI of the Civil Rights Act of 1964.

18. The Commission has not adopted any guidelines or procedures for inspection of facilities subsequent to the construction thereof. Counsel for the Commission wishes to note that he is of the opinion that the Commission does not have any authority to provide for or require such subsequent inspection.

19. The Commission regularly receives from the Connecticut Commission for Higher Education the enrollment figures of the institutions of higher learning throughout the State of Connecticut, which figures are based upon information supplied by the institutions to the Commission for Higher Education. The enrollments in the colleges for the years 1965-1969 as reported by the Commission for Higher Education and the Connecticut State Board of Education are set forth in Exhibits 14-18 appended hereto.

20. A copy of Public Act 585 of 1967 of the State of Connecticut creating the Connecticut Commission on Aid to Higher Education is appended hereto as Exhibit 19.

21. On April 20, 1967, the Connecticut Civil Liberties Union wrote to Defendant concerning the alleged unconstitutionality in the activities of the Connecticut Commission in recommending grants to church related institutions of higher education. A reply thereto was made by Defendants on April 27, 1967. Copies of these letters are appended hereto as Exhibits 20 and 21.

22. The University of Connecticut is an institution of higher learning established by the State of Connecticut and funded primarily by the State of Connecticut, which institution is not organized for nor engaged in the propagation of promotion of the doctrines, teachings and practices of any religion and is open to enrollment of and attracts students of all races and of all or no religious persuasion, and which institution does not require any sectarian training or religious obligations of its students.

23. The University of Hartford is a private institution of higher learning chartered by the State of Connecticut and is not organized for nor engaged in the propagation or promotion of the doctrines, teachings and practices of any religion and is open to enrollment and attracts sutdents of all races and of any or no religious persuasion, and which does not require any sectarian training or religious obligations or its students.

24. Each of the Plaintiffs is a citizen of the United States and of the State of Connecticut, and each pays income and other taxes to the United States.

MARVIN K. PETERSON
CHAIRMAN OF THE COMMISSION
ON AID TO HIGHER EDUCATION
OF THE STATE OF CONNECTICUT

By: Robert K. Killian
Attorney General

/s/ F. Michael Ahern
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut 06115

Hartford, Connecticut
July 25, 1969

/s/ Peter L. Costas
Attorney for Plaintiffs
111 Pearl Street
Hartford, Connecticut 06103

Hartford, Connecticut
July 25, 1969

EXCERPTS FROM TESTIMONY GIVEN AT HEARING BEFORE THREE-JUDGE COURT

* * *

[330] WILLIAM H. CONLEY

called as a witness, being first duly sworn, was examined and testified as follows:

THE CLERK: Will you state your name, please?

THE WITNESS: William H. Conley.

THE CLERK: And where are you from, sir?

THE WITNESS: Fairfield, Connecticut.

DIRECT EXAMINATION

BY MR. SMITH:

Q. Dr. Conley, what is your position? A. President, Sacred Heart.

* * *

[342] CROSS EXAMINATION

BY MR. WILLIAMS:

Q. Dr. Conley, have you been President of Sacred Heart University since its beginning? A. Right.

Q. You went there in 1963? A. Right.

* * *

Q. Now, did there come a time at Fairfield University when you made application for a grant under the Higher Education Facilities Act—Sacred Heart University, for a library? [348] A. What is that?

Q. Did there come a time when you made application for a grant? A. Yes, sir.

Q. When was that, sir? A. I really don't know the date. I'd have to look through the record on what the date is.

Q. Is there a library there now which was erected— A. That is correct.

Q. —as the result of such a grant? A. That is right.

Q. Do you know how much that library cost? A. I believe it was approximately a million and a quarter dollars.

Q. How large was the grant that was made to Sacred Heart? A. For about $380,000, in that bracket; that's a round number.

Q. Has the library been completely erected? A. Yes. It was opned to the students a year ago in October. It has been in full operation since a year ago October.

Q. Now, are any classes conducted in that library? A. There have been none to date. There will be in the next semester because there is a large lecture hall in the library [349] and courses in English, Literature and History are scheduled to be conducted, that is, European History are scheduled to be conducted in the next semester and possibly lecture courses in Fine Arts.

Q. At any time has any form of religious worship been conducted in the library? A. No, sir.

Q. And is there contemplated such? A. No, sir.

Q. Are there religious symbols in the library? A. Not to my knowledge.

Q. Who is your librarian? A. Richard Matzek.

Q. And is he in charge of book acquisition? A. He is.

* * *

[460] WILLIAM C. McINNES

called as a witness, having previously been duly sworn, was further examined, and testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q. Father McInnes, would you state your full name? A. My name is William Charles McInnes.

Q. And where is your place of residence? A. Fairfield, Connecticut.

Q. What is your occupation there? A. I am the President of Fairfield University.

Q. How long have you been so engaged? A. I've been president since June, 1964.

* * *

[463] Q. Directing your attention to Mr. Costas' last observation, was there a time when an application was made by Fairfield University to the Health, Education and Welfare Department for a [464] grant for a Science building to be erected on campus? A. Yes, there was.

Q. Has that Science building been erected, as yet? A. No. The Science building will not be completed until February, 1971.

Q. When was project approval given to that Science building? A. Well, I think it's a long complicated process of getting an approval, as I understand it; that the final project approval for that Science building was given on May 23, 1969.

Q. Do you know, Father McInnes, whether any funds have been disbursed yet for that project? A. No. Under the terms of the agreement with the Government I understand that we were not allowed to apply for any funds and so we did not apply for funds until approximately two months after having received this project approval, which would be this last summer; and I understand that about a month ago we received the first funds from the Government.

Q. And can you tell us what the amount of the grant was with respect to the Science building? A. I understand it was $245,000.

Q. Would you tell the Court, please, the projected cost of the Science building? [465] A. The total cost of the building is estimated now to be $4,500,000.

Q. Is the building actually now under construction on the campus? A. It is.

* * *

[470] Q. Now, did there come a time, while you were president of the university, when an application was made for a grant for the erection of a library on campus? A. Yes, there was.

Q. Can you tell us approximately when that was made? A. I believe that was in 1966.

Q. And was that, in fact, approved? A. Well, again the same process. We submitted to the Commission on Higher Education in Connecticut, which is the State recommending agency, our request to build an academic facility, a library, which is one of the essential components of a university. They measured this request in relationship and in competition with all other academic institutions in the State making the same application. They use an objective set of criteria to decide how these things are to be given. It's based on such academic things as how many more students will you accommodate, what will you use the space for in relationship [471] to making this a better university academically; several things like this. These are all point-scored on standards that they have set up. We were in competition tion with all the other schools at the same time submitting the application.

When this was done, then we had to draw up plans and, as I understand it, it's something like applying for a bank loan; they agree to the kind of thing if all of the conditions are made. You draw up the plans, you show what you are going to do and if this is approved then they give you what they call a project approval to start the thing and then you can start, after that, you can start requesting funds for the building.

Q. Was all this done in connection with the library? A. Yes, it was.

Q. Has the library been completed? A. The library was completed and opened in September, 1968.

Q. How much did the library cost Fairfield University? A. The library cost two million dollars.

Q. What was the amount of the grant? A. The grant was $500,000.

Q. Have all of the funds in the grant been disbursed to Fairfield at this moment? A. I believe that just recently the final payment was [472] received from the Government for the erection of the library.

Q. Now, that library has been in operation, has it, Father, since 1968? A. Yes.

Q. Are any classes taught in the library? A. No. The library is completely a resource center.

Q. Are any religious ceremonies conducted in the library? A. There are no religious ceremonies ever held in the library.

Q. Has there been any deviation from the purpose expressed in your application for a grant with the HEW vis-a-vis this library? A. To my knowledge, there has not. In fact, it's been very much positive confirmation of the purposes. It's given to us, a resource capable of holding 300,000 volumes of books to serve the university.

Q. Is the library made available to the people to Fairfield, Connecticut and surrounding areas? A. Yes. One of the standards that we have of operation in the university is that it serves as an intellectual resource in the community and the library is open to all of the residents of Fairfield. In fact, no encourage them to use it.

Q. Is there any inhibition with respect to the type of [473] books that can be found in the library at Fairfield? A. No. The acquisitions are determined by the requests of each department, according to their needs, and also supervised by the Director of Acquisitions, who has complete control of what she buys for the school.

Q. Who is the Director of Acquisitions? A. The Director of Acquisitions is Mrs. Barbara Bryan.

Q. Is she still on the faculty at Fairfield? A. Yes, she is.

* * *

Q. Now, do you have plans with respect to the Science building, which you described for us earlier in your testimony, [474] as to what precisely it will house in the way of departments? A. Yes, we do, and these were discussed extensively with the Government representatives about the use of the building. It is to be used solely and exclusively for classrooms in the Sciences of Physics, Chemistry, Biology, it's to house the computer center and some of the sections of the psychology department.

Q. Are any other kinds of courses to be taught there? A. No. It's our intention right now to use this building, since it is adapted for this, for Science courses.

Q. Will any form of worship take place in that building? A. No, it will not.

Q. Will there be any religious symbolism in that building? A. No, there will not.

Q. Is there any religious symbolism in your library? A. No, there is not.

* * *

[540] BARBARA BRYAN

called as a witness, being first duly sworn, was examined, and testified as follows:

THE CLERK: State your name, please.

THE WITNESS: Barbara D. Bryan.

THE CLERK: Where are you from?

THE WITNESS: Fairfield, Connecticut.

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q. Would you state your full name, please, Mrs. Bryan? A. Barbara D. Bryan.

Q. B-r-y-a-n? A. That's correct.

Q. Where do you live, please? A. Fairfield, Connecticut.

Q. How long have you lived there? A. About nineteen years.

Q. Mrs. Bryan, do you presently hold a position at Fairfield University? A. Yes, I do.

Q. What is that position? A. I'm Assistant Director of the Library and in charge of acquisitions.

Q. In charge of book acquisitions? A. That's correct.

[541] Q. How long have you been so occupied? A. Since November, 1965; since I started work at the university.

Q. At the time that you were employed by Fairfield University, was that in an old library not now? A. Yes. It was in the old library in Canisius Hall.

Q. And since that time a new library has been erected at Fairfield? A. Yes.

Q. And you are now employed in it? A. Right.

* * *

Q. At the time that you were engaged was any inquiry made with respect to your religious affiliation? [542] A. No, it was not.

Q. Were you then Catholic? A. No.

Q. Are you now? A. No.

Q. Mrs. Bryan, when was it that the new library became operational? A. September, 1968.

Q. And since that time you have been in charge of book acquisitions? A. Yes.

Q. How many volumes does the Fairfield University Library have? A. We have approximately 100,000 bound volumes and we have a considerable microprint collection.

Q. And how many volumes do you have room for in the new library? A. 310,000 bound volumes.

Q. Now, what is the book acquisition policy at Fairfield that you employ? A. Well, of the book budget approximately two-thirds is allocated to the various academic departments for their use. One-third of it is reserved to the library for the purchase of [543] general reference materials, materials that may cross disciplines and other things like that; indexes.

Q. You say that one-third of it is used for what? A. One-third of it is what we call the General Book Fund and

those are materials which the library, it itself, selects and purchases. It includes reference materials, business services, it would include the encyclopedia, it would be recreational reading; this type of thing.

Q. Is there any policy or practice at Fairfield that inhibits you from acquiring any books that you choose as the Book Acquisition Director? A. Only finances.

Q. Only finances. Are any classrooms conducted in the new library building? A. No.

Q. Have there been any classes conducted in the new library building? A. No.

Q. Is there a facility for classes in that building? A. No. We don't have any classrooms in the building. We do have something called group studies, which are available to students who may want to study themselves to work in a project. There are no classes conducted. This is for group study of students [544] who are working on, say, a marketing project for the need to get together in a place where they can talk and have access to library materials. They use a group study. That's the purpose of those particular rooms.

Q. Is any form of religious worship conducted in that building, to your knowledge? A. No.

Q. Has there ever been? A. Not to my knowledge.

Q. Are there any religious symbols or plaques on that building? A. No, there are none.

Q. Have there ever been, to your knowledge? A. No.

* * *

[547] THOMAS A. McGRATH

called as a witness, being first duly sworn, was examined, and testified as follows:

THE CLERK: State your name, please.

THE WITNESS: Thomas Augustin McGrath.

THE CLERK: And where are you from, sir?

THE WITNESS: Fairfield, Connecticut.

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q. How long have you been at Fairfield University, Father? A. Since the summer of 1957. This is my thirteenth year.

* * *

[548] Q. Are you now Chairman of the Psychology Department at Fairfield University? A. Yes, sir.

Q. How many people are in that department? A. We have seven full time professors and one part time professor.

Q. And what is the religious constituency of that department? A. Let me see. Dr. Tolor, Dr. Breginsky, Dr. Levine and Dr. Heiman are Jewish. Dr. Boitano and Dr. Salafia—well, I'm not sure they're tied in with any specific religion. I think in some root form they were once Catholics. Dr. John McCarthy is a Catholic—a bit disaffected, but a Catholic, and I would say the one sort of convinced one is myself. Lawrence Levine is the part time man in Social Psychology. He's from Quinnipiac College, a Doctoral student at U Conn, University of Connecticut.

Q. Where is the Psychology Department presently housed? A. Mainly in Canisius Hall. We have most of our classrooms there and our offices and one lab. We have another animal [549] lab over in the old kitchen of Loyola Hall.

Q. Now, is there a new Science building presently under construction on the campus? A. Yes, sir.

Q. Will it house a portion of the Psychology Department? A. Yes. It will take the whole section of animals and laboratories devoted to animal research and experimentation. Usually we call this physiological psychology, and that whole section will move over.

Q. And what departments of Science, other than your own, will be housed in that new facility? A. Well, I know Physics, Chemistry and Biology. I'm just not sure of Math. I know the other three natural Sciences are there, and I think Math; but I'm not positive.

Q. Will it house both physical Sciences and live Sciences? A. Yes.

Q. Will it house only your laboratory? A. Laboratories and about three offices and small research labs for the professors who are involved in it and their research assistants.

Q. Will any other subjects than the ones that you have outlined be taught in this new facility? A. No sir, not that I know of.

[550] Q. Will any form of religious worship be conducted in that facility? A. No sir, not that I know of.

Q. Do the plans of the building call for any religious symbolism or plaques on that building? A. No sir, not that I know of.

Q. Is there any effort made by you, as head of your department, to superimpose your views on the members of your department with respect to what they may or may not teach in the field of psychology? A. Absolutely not. They come with credentials and they teach it as they wish.

Q. Are there areas in this discipline in which there is potential for conduct between the course matter and so-called Catholic doctrine? A. Yes, I could see where it could arise and I think, in any open discussion, does arise. Once you get into attitudes and beliefs, which is a section of social psychology, taught by Mr. Lavine, I can see where there would be ample areas of cross-over and discussion.

Q. Is there any effort made by your department, or by anyone superior to you, to influence the conduct of that form of discussion? [551] A. No, sir.

Q. Is there any inhibition placed upon any members of your department with respect to what they may or may not teach? A. No, sir.

* * *

[563] DONALD J. ROSS

called as a witness, being first duly sworn, was examined and testified as follows:

THE CLERK: State your name, please.

THE WITNESS: Donald J. Ross.

THE CLERK: And where are you from, sir?
THE WITNESS: Fairfield, Connecticut.

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q. Dr. Ross, would you state your name and address and present occupation, for the record? A. I'm Donald J. Ross of Fairfield, Connecticut and I am a Professor of Biology and Chairman of the Biology Department.

Q. How long have you been so engaged? A. I was Chairman of the Biology Department since 1960, but I was a member of the Biology Teaching Faculty since 1950.

Q. Dr. Ross, where is your department housed at the present time? A. Presently it's housed in Xavier Hall.

Q. And is it to be moved into the new Scinece building? A. Yes, it is.

Q. Did you participate at all in the planning of the new Science building? A. Yes, I did.

Q. Can you tell us what other departments will be housed [564] in that building? A. Yes. The Chemistry Department, the Physics Department, the Mathematics Department and part of the—at least the experimental arm of the Psychology Department.

Q. During the time that you have been teaching Biology at Fairfield have you had complete academic freedom with respect to the content matter of your course? A. Yes.

Q. Has there been, at any time during your time at Fairfield, any effort to superimpose anyone else's views on yours as to what the content of the course should be? A. No.

Q. Has there been any effort to prevent or inhibit you or other members of your department from teaching anything contrary to Catholic position? A. No.

Q. Has this subject ever come up as a problem in your department? A. Any sensitive subject, you mean?

Q. No— A. Sensitive to interpretation by Catholics?

Q. Well, I'll ask you that question: Have you had problems that are sensitive, in nature, that arise in your Biology [565] Department insofar as Catholic doctrine is concerned? A. No.

Q. Do you feel perfectly free to discuss any subjects with your students? A. I do.

Q. And in any way that you choose within your competence? A. Yes, I do.

Q. Is that true of the other members of your department? A. That is true.

MR. ORTH: Objection, your Honor. I don't think the witness would necessarily know how the other members of his department teach.

BY MR. WILLIAMS:

Q. Have you attempted to restrict the other members of your department, in any way, in this regard? A. No.

Q. At any point? A. No.

Q. Now, do you hire the other members of the Biology Department or do you engage them when you're looking for new teachers? A. Yes.

Q. And do you have to have any form of approval from any superior at Fairfield in order to engage a man for your department [566] other than to clear the economics of it? A. No.

Q. Do you have both Catholics and non-Catholics working in your department? A. Yes, I do.

Q. Is there any policy of restriction or discrimination with respect to hiring members of the faculty at Fairfiled University? A. No.

* * *

[583] RICHARD A. MATZEK

called as a witness, being first duly sworn, was examined, and testified as follows:

THE CLERK: Will you state your name?

THE WITNESS: Richard A. Matzek.

THE CLERK: Where are you from?

THE WITNESS: Bridgeport, Connecticut.

DIRECT EXAMINATION

BY MR. WILLIAMS:

MR. WILLIAMS: So that the Court will have a point of reference, we have completed the live testimony with re-

spect to Fairfield University and we will now put in the evidence with respect to Sacred Heart University.

Dr. Conley has already testified. I don't propose to recall him.

Rabbi Wallin has testified for Sacred Heart today.

BY MR. WILLIAMS:

Q. Would you please state your full name? A. Richard A. Matzek.

* * *

[584] Q. Who was it who engaged you at Sacred Heart University? A. I was actually interviewed by a man I was working for at the time in Marquette University, the Head Librarian there, who came to Sacred Heart to become the first Head Librarian at Sacred Heart. He was the only person who interviewed me.

Q. How long have you been Head Librarian at Sacred Heart? A. Since mid summer, 1966.

Q. And prior to that you were the Assistant Librarian? [585] A. That's correct.

Q. How long did you hold that position? A. From June, 1963 until 1966.

Q. In other words, is it the fact, Mr. Matzek, that you went to the university at its very opening? A. Pardon?

Q. You began work at the university at the time it opened? A. That's right. Prior to its opening.

Q. Prior to its opening? A. That's right.

Q. And you've been there since. Did there come a time when your library shifted place and into a new building? A. Yes. We moved in the first few weeks of November, 1968.

Q. And that was in the new library building, which is the subject matter of this litigation? A. That's correct.

Q. How many volumes do you have in that library? A. At present, we have slightly more than 60,000 volumes.

Q. How large was Sacred Heart University when you were there during the first year? A. We began with no students and no books in the library, [586] and we added 10,000 volumes. We've done that pretty well on that basis since the, 10,000 volumes per year.

Q. How many students have you had per year? A. It has increased from 175, approximately, in the first year to, I believe, 1750 at this time.

Q. Your first graduating class was in 1967? A. That's correct.

Q. Now, can you tell us what the practice and policy of the Sacred Heart University Library is with respect to book acquisition? A. I have a staff member, a professional librarian, assigned to acquisitions. The overall policy is a general library–academic library policy in which the faculty recommends a certain percentage of the books to the library staff and then we simply pursue that and purchase them. At this time we're averaging somewhere about 60 per cent to 65 per cent of our books are purchased from faculty requests. The other ones are on standing orders, continuations, periodicals; and that comprises the rest of the book budget.

Q. Now, in addition to your acquisition by purchase, do you receive books as gifts? A. Yes. A certain number of books we receive as gifts. We have not incorporated too many of them. Generally they're not [587] either of a college level or as up to date, for instance, in the fields of the Sciences as we would like. Generally these are not put in. We call upon the faculty, upon occasion, to examine them, to see if they're worthwhile putting in. Many of our gifts have been from our own faculty members, so those generally do go into the collection.

Q. Is there any restriction on your policy of book acquisition? A. No, there has been no restriction.

Q. Other than economics? A. Right. The only reason we've ever had to turn down a faculty member, and it's happened very seldom, was because of lack of funds.

Q. Are there any books which you have been told you cannot have in the Sacred Heart University Library– A. No, sir.

Q. –because of content? A. No, sir.

Q. Now, since the new library has been opened have any classes been conducted in it? A. No, there are no

classrooms in the library building at all. There's one lecture hall.

Q. There is a lecture hall there? [588] A. Yes.

Q. Has it ever been used for the conduct of classes or for lectures? A. It's used for lectures, but not for regularly occurring classes. It's been used for concerts and for some theater work.

Q. Have any religious services been conducted in the library building? A. No, they have not.

Q. Is there any religious symbolism or are there any religious plaques on the library? A. No.

Q. I hand you Exhibit 101, Mr. Matzek, and direct your attention to Page 18 of 101, where there is depicted a drawing of the library building. I direct your attention to the fact that there is a religious statute on the corner of that building. Does that exist there? A. No, sir, it does not.

Q. Did it ever exist? A. No. This is the original architect's conception of the building in the second stage of its design and this is the only exterior architect's sketch that we've had; and that's as far as that statuary garden was on this sketch and it was not [589] approved.

Q. Has there ver been any form of religious symbolism in the building? A. No, sir.

JUDGE BLUMFELD: Well, is there a niche there for a statute in the future?

THE WITNESS: We have a plaque up there now, which is a hand and a book. It's not a religious symbol. It represents—the book is the content of the library and the hand is the guiding hand of the faculty. It's in that exact spot on the building.

BY MR. WILLIAMS:

Q. Are the members of the community permitted to use the library, Mr. Matzek? A. Yes, they are.

Q. And do they use the library? A. Yes, the use has been quite considerable. We allow students from other colleges, from the neighborhing high schools and adults to obtain courtesy cards to use the library.

* * *

[623] SISTER MARY LOUISE

called as a witness, having been previousl.y duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q. Would you state your full name, please? A. Sister Marie Louise Hubert.

Q. And where do you live at the present time? A. New Haven, Connecticut.

Q. What is your present occupation? A. I am President of Albertus Magnus College.

Q. How long have you been President of Albertus Magnus College, Sister? A. I have been President of Albertus since 1956.

* * *

[627] Q. Did there come a time, Sister Marie Louise, when you applied for a grant from the Health, Education and Welfare Department for the construction of a Foreign Language Laboratory? A. Yes.

Q. And was such a grant made? A. Yes, the grant was made.

Q. When did you receive the funds? A. We received a partial payment of the funds in January of 1969.

Q. What was the total amount of the grant that was made? A. The total amount of the grant was originally 24 thousand and some odd dollars and just recently, within the past few weeks, because the cost of construction was less than had been anticipated, it was reduced a few thousand dollars. I don't remember [628] the exact amount, but it's in the neighborhood of $21,000, or so, now.

Q. The cost was less than had been anticipated? A. Yes.

Q. And so the grant was cut? A. Yes.

Q. And you received almost all of the balance, is that correct? A. Yes. The grant as I mentioned before, the first payment was made in January of 1969 and all the rest of the grant, except for $100, was received about two weeks ago.

Q. Now, has that Foreign Language Laboratory been constructed? A. Yes, it has.

Q. And does it sit in one of your academic buildings? A. Yes, it does.

Q. Which one? A. Aquinas Hall, the academic building.

Q. How much of that hall does this laboratory take? A. Two rooms and a connecting room for tapes.

Q. What is the purpose of the Foreign Language Laboratory? A. Pardon me. May I make a correction?

Q. Yes. [629] A. The two language labs and the connecting room in between, plus two offices for the foreign language people who are connected with the lab. That's the unit.

Q. Approximately, can you tell us how much square footage the laboratory takes? A. No, I don't know offhand, without checking.

Q. What is the purpose of the laboratory? A. Well, the purpose of the laboratory is to enable the students in foreign languages to listen to tapes and to produce their own—to hear their own recordings and to improve their pronunciation.

Q. Now, is the use of the laboratory mandatory on the part of those students who are taking language courses at Albertus Magnus? A. Not, it is not mandatory, but there are hours assigned when they may go in to use the laboratory and they are encouraged to do so, especially in the elementary and intermediate courses.

Q. And what languages are taught at Albertus? A. The languages are French, German, Italian, Spanish and Classics are taught; Latin and Greek, but they do not use the language laboratory.

Q. The language laboratory relates only to contemporary life language courses, is that correct? [630] A. Well, yes, that is correct. The Classics people could, but I don't believe they do because it isn't a question of speaking the language, obviously.

Q. Well, are there tapes provided for the courses in the Classics? A. Yes, there are tapes.

* * *

[634] Q. Now, when did the Foreign Language Laboratory in the Aquinas Building become operational? A. I believe it became operational in 1966.

Q. It became operational in '66, but you didn't receive the funds until a few weeks ago from the Federal Government, is that right? A. Yes.

Q. Did you have to submit documents in order to get the disbursement of the final funds a few weeks ago? A. Yes, we did.

Q. At any time since this laboratory has been operational has it been used for any purposes other than as a Foreign Language [635] Laboratory where students in modern language could get help in their pronunciation, understanding of the language? A. No, it has not.

Q. Has it been used directly or indirectly for any religious purposes? A. No, sir.

Q. At any time have any religious services been conducted in this portion of the building? A. No, sir.

Q. Does this portion of the building have any religious symbolism? A. No, it does not.

Q. Are there any plaques or other religious symbols in the Foreign Lanugage Laboratory? A. No, there are not.

Q. Has the language laboratory been used in all respects precisely as it was represented to be used to the Department of Health, Education and Welfare when the loan application was approved? A. Yes.

* * *

[715] SISTER CECILE COMTOIS

called as a witness, being first duly sworn, was examined, and testified as follows:

THE CLERK: Would you state your name, please?

THE WITNESS: Sister Cecile Comtois.

THE CLERK: And where are you from?

THE WITNESS: Woodstock, Connecticut.

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q. Did you spell that for the reporter, Sister? A. C-o-m-t-o-i-s.

Q. Sister, you say that you live in Woodstock, Connecticut, is that correct? A. South Woodstock, to be more accurate.

Q. How long have you resided there? A. I arrived there in December, 1965.

* * *

[716] Q. What is your present occupation, Sister? A. I am President of Annhurst College.

Q. How long have you been president of Annhurst? A. Since December, 1965.

* * *

[720] Q. Did you apply to the Department of Health, Education and Welfare for a grant for the erection of a Cultural Building [721] on the Annhurst campus? A. I did.

Q. Approximately when was that? A. The agreement was made in May, 1967, to award us such a grant

* * *

Q. When did you receive the first disbursement of funds from the Federal Government for this building? A. I'm not positive, but I think it's January of 1969.

Q. I am going to hand you two documents which the clerk has marked Defendants' A-5 and A-6 and ask you when you finally received approval for the project about which we are speaking; namely, the erection of a cultural building for art, music and drama on the Annhurst campus? A. The very final approval was received on March 25th, 1969.

* * *

[724] Q. Is it the fact, Sister, that construction has begun on that building? A. Construction has begun, yes.

Q. And what department at Annhurst will be housed in that building? [725] A. We will have Music, Art and Drama in that building.

Q. It will be a cultural center? A. Cultural center.

Q. Will it also house an auditorium? A. It will house a 1,000 seat auditorium.

Q. How close to completion is that building at the present time? A. I would like to say that it's very near completion. I would hope it would be in January, but I doubt it.

Q. Now, will any classes be conducted in that building, other than those in the humanities: Art, music and drama? A. No other classes will be conducted there.

Q. Will any form of religious worship be conducted in that building? A. No.

Q. Does that building have any religious symbols or religious plaques on its facade or inside? A. It has no religious symbols.

Q. Is it the intention of the administration of Annhurst to make that auditorium available to the people in that area of Connecticut? A. Yes, it is the intention to have it available.

* * *

[766] SISTER CLAIRE PELLETIER

called as a witness, being first duly sworn, was examined, and testified as follows:

THE CLERK: Will you state your name, please?

THE WITNESS: Sister Claire Pelletier.

THE CLERK: And where are you from?

THE WITNESS: I'm from Woodstock, Connecticut.

* * *

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q. How long have you been stationed at Annhurst College, Sister? A. I came to Annhurst in 1965; September, 1965.

Q. And have you been on the faculty there? A. Since then.

Q. What have you taught? [767] A. I've been teaching art.

Q. What courses in art do you teach? A. I am teaching, right now, art education and poster design and lettering.

Q. In what building do you teach that course now? A. Right now I'm teaching in the Academic Building.

Q. Now, is it the intention of your department to move into the new academic facility which is being erected at Annhurst? A. That is correct, Mr. Williams.

Q. And can you tell us approximately when that will be ready for occupancy, if you know? A. I am hoping that it will be ready for the second semester, in January.

Q. And what will that building house, Sister, by way of departments at Annhurst? A. It will have the Fine Arts; the Art, the Music and the Drama.

Q. Will any other subjects be taught in that building? A. No.

Q. Is it the intention of the administration at Annhurst to have any religious services of any kind conducted in that building? [768] A. No, it isn't.

Q. Are there any religious symbols or plaques in the plans for that building? A. There aren't any.

Q. Or are there any in such portions of the building as have already been constructed? A. No, there aren't any.

Q. Now, in your courses in art do you make any effort, or have you ever made any effort, to inculcate or indoctrinate your students with any religious philosophy or religious doctrine? A. No. I don't see how I could do that.

Q. Is your course, in any way, shaped by your views on that subject? A. No, it isn't.

* * *

Supreme Court of the United States

No. 1555 ----, *October Term, 19* 69

Eleanor Taft Tilton, et al.,

Appellants,

v.

Robert H. Finch, Secretary of the United States Department of Health, Education and Welfare, et al.

APPEAL from the United States District Court for the District of Connecticut.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is placed on the summary calendar and set for oral argument immediately following No. 1189.

June 22, 1970

FILED
MAY 11 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. [redacted] 153

ELEANOR TAFT TILTON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RAISNER, ELISABETH R. SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANSHARD, JAY S. ROTH, CARL W. SCHAEFER, NORMAN T. DAVID, HERBERT T. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PENDLETON,

Appellants,

vs.

ROBERT H. FINCH, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY, ALBERTUS MAGNUS COLLEGE,

Appellees.

On Appeal from a Three-Judge United States District Court for the District of Connecticut

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

October Term, 1969

No. .....

ELEANOR TAFT TILTON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RAISNER, ELISABETH R. SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANSHARD, JAY S. ROTH, CARL W. SCHAEFER, NORMAN T. DAVID, HERBERT T. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PENDLETON,

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ROBERT H. FINCH, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY, ALBERTUS MAGNUS COLLEGE,

Appellees.

On Appeal from a Three-Judge United States District Court for the District of Connecticut

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JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of a three-judge court of the United States District Court for the District of Connecticut dismissing the complaint herein.

Appellants brought this action to enjoin the United States Secretary of Health, Education and Welfare and the United States Commissioner of Education from using Federal funds to finance the construction of facilities at sectarian educational institutions purportedly pursuant to Title I of the Higher Education Facilities Act of 1963, 20 U.S.C. §§701-58 (1964), and for judgment declaring that such use is not authorized by the statute or, in the alternative, if authorized, is unconstitutional under the First Amendment of the United States Constitution. Joined as defendants are the chairman of the Commission on Aid to Higher Education of the State of Connecticut and four sectarian colleges in Connecticut whose applications for funds under the Act have been approved by him as well as the other defendants, as required by the Act.

After a five-day trial at which some 155 documentary exhibits were introduced into evidence and the testimony of 22 witnesses were taken, the District Court issued a judgment dismissing the complaint on the merits.

Opinion Below

The opinion of the District Court is as yet unreported. It is printed in Appendix A (pp. 13-30) of this Statement. The District Court's Findings of Fact and Conclusions of Law are printed in Appendix B (pp. 31-43).

Jurisdiction

The judgment of the District Court was issued and filed on March 19, 1970. The appellants herein filed their notice of appeal in the District Court on April 8, 1970. This appeal is taken pursuant to Title 28 of the United States Code, Section 1253. *Briggs* v. *Elliott*, 342 U. S. 350 (1952); *Flast* v. *Cohen*, 392 U.S. 83 (1968).

Statute Involved

The statutory provision involved in this suit is Title I of the Higher Education Facilities Act of 1963. It is printed in Appendix C of this Statement (pp. 44-58).

The Questions Presented

Two questions are presented by this appeal:

(1) Does Title I of the Higher Education Facilities Act of 1963 authorize the expenditure of Federal funds to finance the construction of facilities at educational institutions controlled by religious groups and organized for and engaged in the propagation and promotion of the doctrine, teachings and practices of particular religions so long as the particular facilities so financed will not be used for sectarian instruction or as a place for religious worship or primarily in connection with any part of the program of a school or department of divinity?

(2) If the Act does authorize such expenditure is it to that extent violative of the provisions of the First Amend-

ment to the Federal Constitution forbidding laws respecting an establishment of religion and prohibiting the free exercise thereof?

Statement of the Case

This action was brought by a group of individuals, citizens and taxpayers of the United States and residents of the State of Connecticut challenging the validity of certain expenditures, made by the Department of Health, Education and Welfare, for the construction of facilities at four church-controlled colleges in Connecticut. The complaint alleged that these institutions, joined as defendants to the action, were controlled and conducted by religious orders and the Roman Catholic Diocese of Bridgeport, and that they were organized for and, at the time when the specific grants to them were authorized by the Commissioner of Education, were engaged in the propagation and promotion of the doctrine, teachings and practices of the Roman Catholic religion. The complaint further alleged that such expenditures were not authorized by Title I of the Higher Education Facilities Act of 1963 or, in the alternative, that the Act was to that extent unconstitutional.

At the trial, considerable evidence was offered to support the factual allegations. Conversely, the institutional defendants offered considerable evidence in contradiction thereto. In addition, they offered uncontradicted (and to some extent uncontradictable) evidence that the specific facilities for which the expenditures were authorized had not and would not in the future be used for sectarian instruction or religious worship.

The District Court did not decide the contested factual issues. It held, first, that Congress had indeed intended to authorize expenditures for the construction of facilities at church-controlled educational institutions no matter what the purpose of their organization and the nature of their operations so long as the specific Federally financed facilities were not used for sectarian instruction or worship. It held, second, that the statute so construed was constitutional.

The Questions Presented Are Substantial

There can be little doubt that the questions presented upon this appeal are of national importance. Primarily, they involve the interpretation of an important national law, the Higher Education Facilities Act of 1963, and the constitutionality of that law if it is interpreted to authorize governmental financing of construction of facilities at educational institutions organized for and engaged in propagating and promoting religion. Concurrently, they involve the broader question of the meaning of the Establishment Clause in respect to the direct financing of religious educational institutions out of tax-raised funds.

These are questions which only this Court can answer authoritatively. Determination by this Court is particularly necessary in view of the contrary views expressed by lower courts on the question of constitutionality. Compare the decision of the court below with *Horace Mann League* v. *Board of Public Works*, 242 Md. 645, 220 A. 2d 51, cert. denied, appeal dismissed 385 U. S. 97 (1966).

Nor can there be any doubt that the questions presented in this appeal are substantial. On the question of interpretation, the court below relied upon statements made during the course of debate by the sponsors and floor managers of the legislation that the benefits of the Act were to be available to church-related colleges and universities, and upon the defeat of an amendment which would have disqualified such institutions from receiving benefits under the Act (*infra*, p. 19). But giving full probative value to statements made during floor debates (rather than in the formal reports of the committees reporting out the measure for consideration and adoption by the Congress) and to whatever reasonable inferences can be drawn for the rejection of a particular amendment, the question of interpretation presented in this appeal remains substantial.

It is a far cry from an unwillingness by Congress to exclude all church-related institutions to a willingness to include them all, no matter how deep and extensive is their commitment to the propagation and practice of particular religions. We did not contend in the court below nor do we contend here that all church related colleges and universities, no matter how tenuous the relationship, are excluded from the benefits of the Act. On the contrary, the entire thrust of our trial evidence was to show the extent and intensity of religious teachings and practices in the four institutions joined as defendants, none of which denied that they were church-related. Moreover, we placed considerable reliance on the *Horace Mann League* decision, in which the Maryland Court of Appeals ruled that one of the four colleges whose grants were challenged was constitutionally

eligible to receive state funds although it was concededly church-related.*

Notwithstanding the statements made during floor debates and the rejection of an amendment excluding church-related institutions, the fact remains that Congress could have easily stated expressly that all sectarian colleges (other than theological seminaries) irrespective of other factors were eligible to receive the benefits of the Act. In the absence of such a statement of legislative intent there is wide room for application of the well-established principle that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but grave doubts upon that score." *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401 (1916). See also *United States* v. *Rumely*, 345 U. S. 41 (1953); *Kent* v. *Dulles*, 357 U. S. 116 (1958).

---

* In our Post-Trial brief to the court below, we stated (pp. 5-6):

* * * We do not contend that any relationship between an institution and a church disqualifies the former from receiving governmental funds. In the *Horace Mann League* case, four colleges, all church related, were involved. Nevertheless, the Maryland court held that one of them, Hood College, was constitutionally eligible to receive state funds. Church relationship, the court held, is one factor, but only one to be considered and weighed in determining constitutional eligibility. Church relationship, moreover, is not fungible. In some cases it may be so close as to amount to complete church control; in others it may be no more than a sentimental vestige of a relationship which has long ceased to have practical significance.

If church relationship is not of itself determinative, what is? In *Everson*, the Court stated that government funds may not be used to support any institution that teaches or practices religion. Taken literally, this could mean that a college which employs a chaplain is disqualified for under the law of agency his practice of religion is that of his principal, the college.

We make no such claim. We assert rather that under the Establishment Clause an institution is barred from receiving governmental funds if the teaching or practice of religion is a meaningful and substantial part of its existence.

On the substantive constitutional issue, the court below placed its major if not sole reliance upon *Board of Education* v. *Allen*, 392 U.S. 236 (1968). There this Court, in upholding a statute authorizing the loan of secular textbooks to children, applied the test, enunciated in *Abington School District* v. *Schempp*, 374 U.S. 203, 222 (1963), that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and primary effect that neither advances nor inhibits religion."

Applying that test to the present case, the court below found that the statute meets the first requirement of a legislative secular purpose in that it "contains a declaration that the policy underlying the Act is to increase the student enrollment capacity of the Nation's institutions of higher education through grants for construction of academic facilities to help provide young people with the greatest possible opportunity for higher education; and such declaration is based on congressional findings that there is an urgent need for construction of such facilities to enable these institutions to accommodate anticipated increases in student enrollments" (*infra*, p. 24). The court below held also that the Act meets the second requirement of a primary effect that neither advances nor inhibits religion, since the Act specifically requires that the facilities financed with Federal funds shall not be used for religious instruction or worship (*infra*, pp. 26-27).

The court below acknowledged that, in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), this Court stated (at p. 16):

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever form they may adopt to teach or practice religion.

It acknowledged too, that "this language, read in isolation, might suggest thta the Establishment Clause renders impermissible any governmental aid to church related educational institutions" (*infra*, p. 22). However, it viewed the language merely as dicta and implied, without quite saying so explicitly, that in any event it has been superseded by the purpose-effect test.

It is our contention that nothing this Court has said or done can be construed as expressing an intention to repudiate or abandon the principle, the roots of which go back even before the adoption of the First Amendment, but which received its modern expression in *Everson*, that government may not finance institutions which teach or practice religion. In the *Allen* case, this Court specifically quoted the statement from *Everson* that the Establishment Clause bars any "tax in any amount, large or small • • • levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion" (392 U.S. at 242). The Court stated further (at 243-4):

> • • • The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically in the State. *Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.* Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in Everson and does not alone demonstrate an unconstitutional degree of support for a religious institution. (Emphasis added.)

We contend further that, even if the purpose and effect test is used, the result should be the same since a grant of governmental funds to an educational institution organized for the purpose and actively and intensively engaged in the propagation of a particular religion cannot but have the purpose and certainly the effect of advancing religion. Under either theory, it is our contention that it is constitutionally immaterial that the funds are earmarked for the construction of a particular college facility which will not be used for the teaching or practice of religion.

The court below noted that the purpose of the Act is to increase attendance at institutions of higher education. But if an institution organized for the primary purpose of propagating and advancing religion finds it necessary in order to achieve that purpose to provide the students also with secular instruction, can it be gainsaid that a law whose purpose is to increase attendance at such an institution has the purpose of advancing religion? Can it be gainsaid that the primary effect of such a law is to advance religion?

What the court below has held is that it matters not what the institution does generally but only what it does with the specific facility to which it earmarks governmental funds. In other words, an institution which admits only students of a particular religion, requires them to participate in religious activities, compels them to comply with the doctrines and dogmas of the religion, forces them to attend church, requires them under penalty of dismissal to take instruction in the theology and doctrines of the religion, and does everything to propagate and advance a particular

religion other than confer degrees in divinity, can constitutionally receive governmental funds so long as in its bookkeeping it allocates these funds to the construction of a chemistry laboratory or gymnasium.

If the Establishment Clause now allows this then we suggest it has become little more than dead letter.

Conclusion

The Federal questions presented by this appeal are substantial and of national importance. It is therefore respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

LEO PFEFFER
PETER L. COSTAS
Attorneys for Appellants

April, 1970

Appendix A

UNITED STATES DISTRICT COURT

District of Connecticut

Civil No. 12,767

Eleanor Taft Tilton, Mildred H. Clark, Carol D. Goldstone, Theodore Gurney, Harvey L. Raisner, Elisabeth R. Swain, Wyman W. Parker, Paul A. Reynolds, Rufus Blanshard, Jay S. Roth, Carl W. Schaefer, Norman T. David, Herbert T. Goldstone, James W. Gardner, Jr., Charles L. Pendleton,

Plaintiffs,

vs.

Robert H. Finch, Secretary of the United States Department of Health, Education and Welfare, James E. Allen, Jr., Commissioner of Education of the United States, Marvin K. Peterson, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, Sacred Heart University, Annhurst College, Fairfield University, Albertus Magnus College,

Defendants.

Before J. Joseph Smith, Circuit Judge, and Timbers and Blumenfeld, District Judges.

Taxpayers suit seeking declaratory and injunctive relief on the ground that their constitutional rights are impaired by the Higher Education Facilities Act of 1963, 20 U.S.C.

§§701-58 (1964), and by grants thereunder to defendant church related colleges and universities for construction of academic facilities. Judgment for defendants.

Leo Pfeffer, New York, N.Y., Peter L. Costas, Melvin S. Katz, Paul W. Orth, Robert Smith, Hartford, Conn., and Jerry Wagner, Bloomfield, Conn., *for plaintiffs.*

Jeffrey F. Axelrad, Atty., William D. Ruckelhaus, Asst. Atty. Gen., Harland F. Leathers, Atty., Dept. of Justice, Wash. D.C., Stewart H. Jones, U.S. Atty., and F. Mac Buckley, Asst. U.S. Atty., Hartford, Conn., *for defendants Robert H. Finch and James E. Allen, Jr.*

F. Michael Ahern, Asst. Atty. Gen., and Robert K. Killian, Atty. Gen., State of Connecticut, Hartford, Conn., *for defendant Marvin K. Peterson.*

Edward Bennett Williams, Jeremiah C. Collins and Charles H. Wilson, Jr., of Williams & Connolly, Wash. D.C., *for all defendant colleges and universities.*

James J. O'Connell, of Coles, O'Connell & Dolan, Bridgeport, Conn., *for defendant Sacred Heart University.*

Howard T. Owens, of Owens & Schine, Bridgeport, Conn., *for defendants Annhurst College and Fairfield University.*

Donald F. Keefe, Lawrence W. Iannotti and Bruce Lewellyn, of Tyler, Cooper, Grant, Bowerman & Keefe, New Haven, Conn., *for defendant Albertus Magnus College.*

TIMBERS, District Judge:

QUESTIONS PRESENTED

This taxpayers suit seeking declaratory and injunctive relief with respect to the Higher Education Facilities Act of 1963, 20 U.S.C. §§701-58 (1964) (the Act), presents the following essential questions:

(1) Whether the Act authorizes grants to defendant church related colleges and universities for construction of academic facilities.

(2) If so, whether the Act and grants thereunder impair plaintiffs' rights under the establishment clause or the free exercise clause of the First Amendment of the Constitution of the United States.

For the reasons stated below, we hold that the Act does authorize the grants in question and that neither the Act nor the grants thereunder impair plaintiffs' constitutional rights in the respects claimed.[1] Judgment therefore must be entered for defendants dismissing the complaint.

PARTIES TO THE ACTION

Plaintiffs are fifteen residents and citizens of the United States and of Connecticut. They are federal taxpayers suing for themselves and others similarly situated. As taxpayers they have standing to sue. *Flast* v. *Cohen*, 392 U.S.

1. Plaintiffs assert a further claim that, to the extent that funds are granted under the Act to "sectarian" institutions, to that extent "non-sectarian" institutions are deprived of such funds and are discriminated against, in violation of the First and Fourteenth Amendments. We also reject this claim as lacking merit. The eligibility of an institution for grants under the Act does not depend upon its relation to any organized religion.

83, 88-91 (1967); see *Association of Data Processing Service Organizations, Inc.* v. *Camp*, —— U.S. ——, 38 U.S.L.W. 4193 (U.S. March 3, 1970), and *Barlow* v. *Collins*, —— U.S. ——, 38 U.S.L.W. 4195 (U.S. March 3, 1970).

Defendant government officials are the Secretary of the Department of Health, Education and Welfare of the United States, the Commissioner of Education for the United States, and the Chairman of the Connecticut Commission on Aid to Higher Education; they are sued in their official capacities, particularly with respect to their duties in the administration of the Act. Defendant colleges and universities are Sacred Heart University, Annhurst College, Fairfield University and Albertus Magnus College, four church related Connecticut colleges and universities;[2] they are sued as recipients under the Act of grants for the construction of various academic facilities.

CLAIMS OF THE PARTIES

Plaintiffs claim that the Act does not authorize grants to defendant colleges and universities for construction of academic facilities; and, if the Act does authorize such grants, the Act and grants violate the establishment clause and the free exercise clause of the First Amendment. Accordingly, plaintiffs seek (i) a declaratory judgment that

2. The amended complaint alleges that each of the four defendant institutions are "organized for and engaged in the propagation and promotion of the doctrine, teachings and practices of the Roman Catholic religion"; that three of the institutions, Annhurst College, Fairfield University and Albertus Magnus College, are "organized, conducted and controlled" by religious orders; and that the fourth, Sacred Heart University, is "organized, conducted and controlled" by the Diocese of Bridgeport of the Roman Catholic Church. Amended complaint, ¶¶12-16.

the determinations and actions of defendant government officials in allocating federal funds to defendant colleges and universities for construction of academic facilities are not authorized by the Act, or, in the alternative, if the Act authorizes such grants, a declaratory judgment that the Act to that extent is unconstitutional and the grants are void; (ii) injunctive relief enjoining defendant government officials from recommending and approving any program for the expenditure of federal funds to finance in whole or in part construction of academic facilities in "sectarian educational institutions" and enjoining defendant colleges and universities from receiving any more funds already awarded under the Act; and (iii) such further relief as may be just and proper.

Defendants' position is that the grants received by defendant colleges and universities are authorized by the Act and that the Act and grants do not impair plaintiffs' constitutional rights.

JURISDICTION

This Court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §1331(a) (1964).

Since the action seeks injunctive relief with respect to an Act of Congress on the ground of repugnance to the Constitution of the United States, a special statutory district court of three judges were convened to hear and determine the action pursuant to 28 U.S.C. §§2282 and 2284 (1964).

HEARINGS AND RECORD

The pleadings having been closed, the Court held a five day hearing at Hartford on the merits.

The record before the Court consists of the pleadings; facts established by stipulation; some 155 documentary exhibits; and the testimony of 22 witnesses.

Counsel for the respective parties have been fully heard in oral argument; and they have submitted helpful briefs, together with proposed findings of fact and conclusions of law.

CLAIM THAT ACT DOES NOT AUTHORIZE GRANTS TO DEFENDANT COLLEGES AND UNIVERSITIES

The threshold question is whether the Act authorizes grants to defendant colleges and universities for construction of academic facilities, plaintiffs' initial claim being that Congress did not intend to make church related institutions of higher education eligible for grants under the Act.

The Act by its terms neither includes nor excludes church related institutions as such; it simply authorizes grants to "institutions of higher education"[3] of federal funds for construction of academic facilities.

The Act, however, defines an "institution of higher education"—without regard to whether it is church related or not—as an institution which is nonprofit, accredited and legally authorized by the state in which it is located to pro-

3. 20 U.S.C. §§711, 716 (1964).

vide a program of education beyond high school.[4] Since church related colleges and universities may meet these criteria, they may be eligible for grants under the Act.

Moreover, the Act forbids grants for construction of "any facility used or to be used for sectarian instruction or as a place for religious worship" or "any facility which • • • is used or to be used primarily in connection with any part of the program of a school or department of divinity".[5] These limitations in the Act itself make it plain that grants for construction of academic facilities to be used in connection with other functions of church related colleges and universities were contemplated.

Indeed the legislative history is quite conclusive that Congress intended to make the benefits of the Act available to church related colleges and universities.[6] Not only did the sponsors and floor managers of the legislation so state in the debate,[7] but amendments to deny the benefits of the Act to such institutions were voted down.[8]

As to whether the Act authorizes the instant grants to defendant colleges and universities, we hold on the basis of the entire record before the Court that defendant government officials clearly acted in accordance with the provi-

4. 20 U.S.C. §751(f) (1964).

5. 20 U.S.C. §751(a)(2) (1964).

6. For the legislative history of the Act, *see generally* 1963 U.S. Code Cong. and Adm. News, pp. 1172-1202.

7. 109 Cong. Rec. 14150-51 (1963) (Remarks of Representative Powell); *id.* at 14159 (Remarks of Representative Quie); *id.* at 18409-12 (Remarks of Senator Prouty); *id.* at 19427-30 (Remarks of Senator Morse).

8. 109 Cong. Rec. 19492-96 (1963).

sions of the Act and within the scope of their authority in recommending and approving the grants in question.[9]

Having held that the Act authorizes the grants to defendant colleges and universities for construction of academic facilities, we turn now to plaintiffs' claims that the Act and the grants thereunder impair their constitutional rights.

ESTABLISHMENT CLAUSE CLAIM

Plaintiffs' primary claim challenging the constitutionality of the Act and the grants is that they violate the establishment clause of the First Amendment which provides that "Congress shall make no law respecting an establishment of religion. * * *"[10] Plaintiffs assert that federal aid in the form of construction grants to private church related educational institutions constitutes government aid to religion.

The Supreme Court has not ruled on the precise issue here presented, although it has examined the scope and meaning of the establishment clause in several decisions. Only in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and *Board of Education* v. *Allen*, 392 U.S. 236 (1968), how-

9. Reference is made to the Court's separate Findings of Fact filed herewith for a more detailed statement of the nature and purpose of the grants here involved and the manner in which the applications for such grants have been processed by defendant government officials.

10. More specifically, plaintiffs allege as the first count in their amended complaint that the determinations and actions of defendants "effect a contribution of tax-raised funds to the support of institutions which teach the tenets of a church and constitute governmental financing of religious groups and government action whose purpose and primary effect is to advance religion" in violation of the establishment clause. Amended complaint, ¶29.

ever, has the Supreme Court touched upon the establishment clause validity of government aid to private church related education.[11]

Everson involved an establishment clause challenge to a New Jersey statute which provided state reimbursement to parents of parochial school children as well as to parents of public school children for the cost of bus transportation to and from school. The Supreme Court held that the statute did not violate the establishment clause. In the course of its opinion, the Court stated:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, what-

11. There are pending a number of recent cases involving challenges under the establishment clause of the First Amendment, made applicable to the states by the Fourteenth Amendment, with respect to the validity of state statutes which authorize use of state funds to aid church related education. See, e.g., *Opinion Of The Justices,* —— Me. ——, —— A.2d —— (1970), slip opinion January 15, 1970 (proposed Maine Nonpublic Elementary Education Assistance Act of 1970, authorizing purchase of secular educational services from nonpublic schools, *held* (4-2), to violate establishment clause); *Lemon* v. *Kurtzman,* —— F.Supp. —— (E.D.Pa. 1969), slip opinion November 28, 1969 (Pennsylvania Nonpublic Elementary and Secondary Education Act of 1969, authorizing payment of state funds to nonpublic elementary and secondary schools as reimbursement for teaching certain secular subjects, *held* by a three-judge district court (2-1), not to violate establishment clause); *Vermont Educational Buildings Financing Agency* v. *Mann,* 127 Vt. 262, 247 A.2d 68 (1968), *prob. juris. noted,* 37 U.S.L.W. 3379 (U.S. April 18, 1969); *juris. postponed,* 38 U.S.L.W. 3017 (U.S. July 1, 1969) (Vermont Educational Building Financing Act of 1966, authorizing leasing and subleasing agreements between state agency and church related college for construction of classroom and science building, *held* (4-1), not to violate establishment clause); *Connecticut Civil Liberties Union* v *Sanders,* Civil No. 13432 (D. Conn., complaint filed September 30, 1969, action pending before three-judge district court) (Connecticut Act Concerning Assistance To Nonpublic Schools For Secular Education of 1969, authorizing Secretary of State Board of Education to purchase from nonpublic schools secular educational services for students, challenged, *inter alia,* as violative of establishment clause).

> ever they be called, or whatever form they may adopt to teach or practice religion." 330 U.S. at 16.

Although this language, read in isolation, might suggest that the establishment clause renders impermissible any government aid to church related educational institutions, such suggestion is dispelled by the Court's actual decision sustaining the statute. The Court so held even though it recognized that parochial schools received some benefit from state subsidization of bus transportation for parochial school children. 330 U.S. at 17. The Court noted that a state could not exclude individuals *"because of their faith, or lack of it,* from receiving the benefits of public welfare legislation." (Emphasis that of the Court) 330 U.S. at 16. Since it viewed state subsidization of bus transportation as a public welfare measure in the same category as such general government services relating to schools as police and fire protection, sewage disposal, public highways and sidewalks, it concluded that the challenged statute did not violate the establishment clause. 330 U.S. at 17-18.

Allen, the most recent Supreme Court decision dealing with government aid to church related education, involved an establishment clause challenge to a New York statute authorizing the state to loan secular school textbooks to parochial school students. In determining the validity of the challenged statute, the Court utilized the secular purpose and primary effect test under which "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." 392 U.S. at 243, quoting from *Abington School District* v. *Schempp,* 374

U.S. 203, 222 (1963), where the secular purpose and primary effect test was first enunciated. Applying this test in *Allen*, the Court upheld the statute on the ground that its stated legislative purpose clearly was secular and the primary effect of the loan of secular textbooks could not be said either to advance or inhibit religion.

We are not persuaded by plaintiffs' argument that *Allen* establishes some sort of child-benefit theory under which direct government aid to church related educational institutions is not permissible, while government aid to students attending such institutions is permissible because government aid to an institution in the form of student subsidies is not direct. Although the challenged statute in *Allen* authorized aid to parochial school students and their parents rather than to the schools themselves, the Court neither held nor suggested that the identity of the direct recipient of the aid was the critical factor in determining the constitutionality of the statute under the establishment clause.[12] Moreover, the child-benefit or indirect-direct aid approach would fashion an unacceptable test based on form rather than substance inasmuch as the "constitutional result would depend upon minute distinctions and technicalities." *Lemon* v. *Kurtzman, supra* note 11, at .... (slip opinion at 24). Consequently, we view *Allen* as confirming the secular purpose and primary effect test, rather than a child-benefit test, as controlling with respect to the establishment clause validity of the Act.

12. See also *Bradfield* v. *Roberts*, 175 U.S. 291 (1899), a much earlier decision, in which the Court sustained a federal statute authorizing direct federal aid to a hospital owned and controlled by a corporation composed of members of a monastic order or sisterhood of the Roman Catholic Church.

Lemon v. *Kurtzman, supra* note 11, at .... (slip opinion at 24-25); *Vermont Educational Buildings Financing Agency* v. *Mann, supra* note 11, at 270-71.

Applying the secular purpose and primary effect test to the Act here in question, we find that it clearly meets the first requirement of a secular legislative purpose. The purpose of the Act appears on its face. It contains a congressional declaration that the policy underlying the Act is to increase the student enrollment capacity of the Nation's institutions of higher education through grants for construction of academic facilities to help provide young people with the greatest possible opportunity for higher education; and such declaration is based on congressional findings that there is an urgent need for construction of such facilities to enable these institutions to accommodate anticipated increase in student enrollments.[13] These findings are based on evidence before Congress of the great need for expansion of educational facilities; and of the high proportion of private, including church related, colleges and universities available for such expansion.

13. The Act's statement of congressional findings and declaration of policy reads as follows (20 U.S.C. §701 (1964)):

> "The Congress hereby finds that the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education. The Congress further finds and declares that these needs are so great and these steps so urgent that it is incumbent upon the Nation to take positive and immediate action to meet these needs through assistance to institutions of higher education, including graduate and undergraduate institutions, junior and community colleges, and technical institutes, in providing certain academic facilities."

There was ample rational basis in the evidence before Congress for such findings. We do not believe it to be within our competence to question such findings. *United States* v. *Gainey*, 380 U.S. 63, 66-68 (1965); *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964); *Tot* v. *United States*, 319 U.S. 463, 466 (1943). We hold, based on Congress' declaration of policy and findings, that the Act has the secular purpose of increasing the student enrollment capacity of the Nation's institutions of higher education —an existing urgent public need—and that the Act does not have the purpose of promoting religion of any kind.

The Act also meets the second requirement of a primary effect that neither advances nor inhibits religion. The focus of this test as applied in *Allen* is the function, secular or religious, which the government aid subsidizes—not the nature of the institution, secular or religious, which receives the aid.[14] In *Allen*, the Court noted that it long had recognized that church related educational institutions pursue two goals: secular education and religious instruction. 392 U.S. at 245-48.

The history of church related educational institutions in this Country reflects this dual function. Legislative, judicial, and prevailing social attitudes demonstrate beyond question that church related educational institutions play a large and vital role in providing secular education. Legis-

14. In *Horace Mann League* v. *Board of Public Works*, 242 Md. 645, 220 A.2d 51, *cert. denied, appeal dismissed*, 385 U.S. 97 (1966), the Maryland Court of Appeals held that the constitutionality of direct construction grants under the establishment clause depended on whether the recipient institution was "sectarian". We believe this holding is inconsistent with the controlling *Allen* secular purpose and primary effect test.

lative and judicial determinations have long established that a state's interest in secular education does not require that all children attend publicly operated schools; attendance at church related schools satisfies state compulsory education laws provided the schools meet state secular education requirements. The Supreme Court summarized in *Allen, supra,* at 247-48, from the standpoint of the constitutional standard applied in that case, the relationship of the sectarian function to the secular education function of private schools, including parochial schools:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education."

The Act before us was carefully drafted to insure that grants made to church related educational institutions would subsidize the secular rather than the religious functions of such institutions. It authorizes grants only for the

construction of academic facilities to be used for secular purposes; and specifically prohibits grants for the construction of any facility to be used for religious instruction or worship.[15] In addition, there are other provisions of the Act and administrative regulations which insure that facilities constructed with federal grants are and will be used only for secular purposes.[16] We hold that the Act has a primary effect that neither advances nor inhibits religion.

For the reasons stated above, we conclude that plaintiffs' claim that the Act and grants to defendant colleges and universities for construction of academic facilities impair their rights under the establishment clause is without merit.

FREE EXERCISE CLAUSE CLAIM

Plaintiffs also claim that the Act and grants impair their rights under the free exercise clause on the ground that they effect compulsory taxation for religious purposes.

Since the Act has a secular legislative purpose and a primary effect which neither advances nor inhibits religion, it cannot be said to effect taxation for religious purposes. Moreover, a legislative enactment does not abridge the free exercise clause unless it has a coercive effect on an individual in the practice of his religion. Plaintiffs have not shown that the Act coerces them as individuals in the practice of their religion in any way. *Allen, supra,* at 248-49;

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15. 20 U.S.C. §751(a)(2) (1964).

16. 20 U.S.C. §754 (1964); 45 C.F.R. §170.14 (1969); Plaintiffs' Exhibits 125 and 126.

Schempp, supra, at 223; *Lemon, supra,* at —— (slip opinion at 25-27). Therefore, plaintiffs' free exercise claim is without merit.

We are mindful of the centuries of human struggle that culminated in the sixteen cryptic words which constitute the establishment and free exercise clauses of the First Amendment; and we have profound respect for the framers of the Bill of Rights and their determination to erect a wall between church and state which must be kept high and impregnable.[17]

We also recognize the strong national policy of providing higher education for the burgeoning numbers of young men and women who aspire to and are qualified for a higher education.[18] Providing such education may well be critical to the survival of this Nation.

It would be ironic indeed if this Act of Congress, so specifically intended and precisely written to comply with the constitutional standard of a secular legislative purpose and a primary effect that neither advances nor inhibits religion, were to be stricken down in the name of religious freedom. Our careful study of the Act, its legislative history and the entire record before us leaves us with a strong conviction that the Act and the grants do not violate the establishment clause or the free exercise clause of the First Amendment.

In short, here we find no conflict between preservation of religious freedom and provision of higher education. Without both, we may end up with neither.

17. *Everson* v. *Board of Education,* 330 U.S. 1, 18 (1947).

18. See Preamble To Higher Education Facilities Act of 1963, *supra* note 13.

CONCLUSIONS

We hold that:

(1) The Court has jurisdiction over the subject matter and the parties.

(2) The Act authorizes the grants made to defendant colleges and universities for construction of academic facilities.

(3) The Act and grants thereunder do not impair plaintiffs' rights under the establishment clause or the free exercise clause of the First Amendment.

(4) The Act and grants thereunder do not discriminate against non-sectarian institutions by depriving them of federal funds in violation of the First and Fourteenth Amendments.

(5) Plaintiffs are not entitled to injunctive relief against defendants.

(6) Defendants are entitled to judgment dismissing the complaint, but without costs.

This opinion, together with the separately stated Findings of Fact and Conclusions of Law filed herewith, constitute the Court's findings of fact and conclusions of law pursuant to Rule 52(a), Fed. R. Civ. P.

Defendants' motions to dismiss, which were made at the close of plaintiffs' opening statement and at the close of plaintiffs' case, are denied. Various motions to strike evidence upon which the Court reserved decision, are de-

nied insofar as they are directed at evidence which supports the Court's findings of fact and conclusions of law; in all other respects, the motions are dismissed as moot.

Dated at Hartford, Connecticut, this 19th day of March, 1970.

J. JOSEPH SMITH

J. JOSEPH SMITH
United States Circuit Judge

WILLIAM H. TIMBERS

WILLIAM H. TIMBERS
United States District Judge

M. JOSEPH BLUMENFELD

M. JOSEPH BLUMENFELD
United States District Judge

Appendix B

Findings of Fact and Conclusions of Law

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. 12,767

ELEANOR TAFT TILTON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RAISNER, ELISABETH R. SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANSHARD, JAY S. ROTH, CARL W. SCHAEFER, NORMAN T. DAVID, HERBERT T. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PENDLETON,

Plaintiffs,

vs.

ROBERT H. FINCH, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY, ALBERTUS MAGNUS COLLEGE,

Defendants.

The Court, after full hearing, makes the following Findings of Fact and Conclusions of Law which, together with the Court's opinion filed herewith, constitute the Court's findings of fact and conclusions of law pursuant to Rule 52(a), Fed. R. Civ. P.

FINDINGS OF FACT

(A) The Parties

(1) Plaintiffs are fifteen residents and citizens of the United States and of Connecticut; they are federal taxpayers suing for themselves and others similarly situated; and as taxpayers they have standing to sue.

(2) Defendant Robert H. Finch is Secretary of the Department of Health, Education and Welfare of the United States; in that capacity he has executive responsibility for the operation of federal programs relating to education.

(3) Defendant James E. Allen, Jr. is Commissioner of Education for the United States (Commissioner); in that capacity he is in charge of the Office of Education of the United States (Office of Education), which administers and supervises various federal programs relating to education and assistance thereof.

(4) Defendant Marvin K. Peterson is Chairman of the Connecticut Commission on Aid to Higher Education (Connecticut Commission), which was created to implement the State's participation in the Higher Education Facilities Act of 1963, 20 U.S.C. §§701-58 (1964) (the Act).

(5) Defendant Sacred Heart University is a coeducational liberal arts university located in Fairfield, Connecticut.

(6) Defendant Annhurst College is a liberal arts college for women located in Woodstock, Connecticut.

(7) Defendant Fairfield University is a liberal arts university for men located in Fairfield, Connecticut.

(8) Defendant Albertus Magnus College is a liberal arts college for women located in New Haven, Connecticut.

(B) Statutory Scheme

(9) In 1963, Congress enacted the Higher Education Facilities Act. Title I of the Act (Title I), 20 U.S.C. §§701-21 (1964), authorizes grants of federal funds to institutions of higher education for construction of undergraduate academic facilities.

(10) An institution of higher education is eligible for a Title I grant for construction of an academic facility only if construction of such facility will result in an urgently needed substantial expansion of the institution's student enrollment capacity or of its capacity to carry out one of the other purposes of the Act. 20 U.S.C. §716 (1964).

(11) An "institution of higher education" is defined in the Act as one which:

(a) admits as regular students individuals having a certificate of graduation from a high school, or the recognized equivalent thereof;

(b) is legally authorized within the State to provide a program of education beyond high school;

(c) is a public or other nonprofit institution;

(d) provides an educational program for which it awards a bachelor's degree; or provides not less than a two-year educational program which is ac-

ceptable for full credit toward a degree; or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(3) is accredited by a nationally recognized accrediting agency or association approved for that purpose by the Commission or meets one of the alternatives thereto. 20 U.S.C. §751(f) (1964).

(12) The Act specifically excludes from its definition of academic facilities "any facility used or to be used for sectarian instruction or as a place of religious worship, or * * * any facility which (although not a facility described in the preceding clause), is used or to be used primarily in connection with any part of the program of a school or department of divinity. * * *" 20 U.S.C. §751(a) (2) (1964).

(C) Regulatory Scheme

(13) A State desiring to participate in the Title I grant program must designate a State agency which is broadly representative of the public and of institutions of higher education within the State and must submit to the Commissioner, through that agency, a State plan for participation in the program. 20 U.S.C. §715(a) (1964).

(14) The State of Connecticut designated, as the State agency responsible for administration of the State's re-

sponsibilities under Title I, the Connecticut Commission, which is broadly representative of the public and of institutions of higher education in the State.

(15) In 1964, the Connecticut Commission adopted a State plan for participation in the Title I grant program; the plan was submitted to and approved by the Commissioner; the plan complies with all pertinent provisions of the Act.

(16) The Connecticut Commission receives applications for Title 1 grants from institutions of higher education throughout the State of Connecticut.

(17) In accordance with the procedures of the Connecticut Commission, applications for grants are submitted on forms provided by the Commissioner.

(18) Instructions which accompany applications for use in their preparation and submission emphasize that academic facilities to be used for sectarian instruction, religious worship or primarily in connection with any part of the program of a school or department of divinity are not eligible for grants; in each application the institution applying for a grant gives certain assurances, including assurances that no part of the areas included in the proposed project will be used for such proscribed purposes.

(19) The Connecticut Commission employs a staff which reviews the applications to determine whether they meet various statutory criteria of eligibility, the requirements of the Commissioner and the requirements of the State plan adopted by the Connecticut Commission.

(20) Applications which are found to meet the statutory criteria of eligibility are then evaluated by the Connecticut Commission with respect to several factors contained in the State plan to determine the relative priorities of eligible projects for proper allocation of federal funds available to Connecticut in a particular fiscal year. The setting of relative priorities among eligible projects is specifically required by the Act. 20 U.S.C. §717(a) (1964). The factors taken into account by the Connecticut Commission in setting the relative priorities are the projected future enrollment increases at an institution (both numerical and percentage); the institution's projected increase in facilities (both numerical and percentage); and the institution's utilization of facilities (which is determined according to a capacity/enrollment ratio, average weekly use of classrooms and average weekly use of laboratories). Consideration of these factors is intended to assure that the limited federal funds available for Title I projects will be awarded for those projects for which there is an urgent need consistent with the purposes of the Act.

(21) Based on the procedures described above in paragraphs (16) through (20), the Connecticut Commission decides which projects to recommend for grants and the amounts of the grants to be recommended. The recommendations of the Connecticut Commission are forwarded to the Commissioner for further review.

(22) The Office of Education maintains a staff which reviews the recommendations for grants from several state agencies. The Office of Education seeks to assure itself that the applicant has complied with all applicable provisions of the Act and regulations promulgated thereunder,

including the requirement that no eligible portion of a federally funded facility be used for religious worship or sectarian instruction or in connection with the program of a school or department of divinity.

(23) A grant under Title I is not approved unless the Office of Education is satisfied on the basis of its review of each application that the provisions of the Act and the regulations have been complied with. Where necessary or appropriate to the making of this determination, other information supplied by an applicant or otherwise available to the Office of Education is also taken into consideration.

(24) Successful applicants, upon being notified directly by the Office of Education that their grants have been approved, then execute a "Grant Agreement" which signifies their acceptance of the federal financial assistance.

(25) Thereafter, before grant funds may be disbursed, the following steps must be taken:

(a) Final working drawings and specifications of the funded facility must be submitted to and approved by the Commissioner.

(b) Standard "Terms and Conditions", incorporated into all grant agreements, must be satisfied.

(D) The Grants

(26) Sacred Heart University submitted an application to the Connecticut Commission for a Title I grant for construction of a new library.

(27) Annhurst College submitted an application to the Connecticut Commission for a Title I grant for construc-

tion of a new music, drama and arts building with an auditorium to be used for general academic programs.

(28) Fairfield University submitted an application to the Connecticut Commission for a Title I grant for construction of a new library building.

(29) Fairfield University also submitted an application to the Connecticut Commission for a Title I grant for construction of a new science building to house the biology, chemistry, mathematics and physics departments, the computer instructional and research division and some biology-related functions of the psychology department; the grant requested was for construction of the science building minus the computer facilities.

(30) Albertus Magnus College submitted an application to the Connecticut Commission for a Title I grant for construction of academic facilities to be located in a general academic building containing classrooms, faculty and administrative offices, faculty seminar room, student study area, language laboratories and adjoining offices and necessary related service and maintenance facilities; the grant was requested for construction of tw olanguage laboratories and adjoining offices and necessary related service facility in the general academic building.

(31) Each of these applications affirmatively demonstrated that the grant for which application was made would result in an urgently needed substantial expansion of the institution's student enrollment capacity and would be used solely for construction of secular academic facilities.

(32) Each of these applications affirmatively demonstrated that the grant for which application was made would be used only for construction of the facility specified therein; and that no part of any funds granted would be used to defray any part of the cost of any facility used or to be used for sectarian instruction or as a place for religious worship, or for any facility used or to be used primarily in connection with any part of the program of a school or department of divinity.

(33) The Connecticut Commission properly recommended each of these applications and transmitted them to the Office of Education which in turn properly approved each of them.

(34) Sacred Heart University has been the recipient of a Title I grant in amount of $367,100 for construction of a library which has been completed.

(35) The Sacred Heart University Library opened in November, 1968. The University presented evidence that no classes have been conducted in the library; that no restrictions have been imposed on the books that may be acquired for the library; that no religious worship or services have been conducted in the library; and that there are no religious symbols or plaques in or on the library. Plaintiffs presented no evidence to the contrary. The Sacred Heart University Library, and the federal funds which assisted its construction, have been used solely for non-religious purposes.

(36) Annhurst College has been the recipient of a Title I grant in amount of $444,182 for construction of a fine arts

building with an auditorium which is currently under construction.

(37) The Annhurst College Fine Arts Building was scheduled for occupancy sometime after January, 1970. The College presented evidence that the building will be used for courses in music, art and drama; that no religious worship or services will be conducted in the building; and that there will be no religious symbols or plaques in or on the building. Plaintiffs presented no evidence to the contrary. The Annhurst College Fine Arts Building, and the federal funds which are assisting its construction, will be used solely for non-religious purposes.

(38) Fairfield University has been the recipient of two Title I grants. The first was in amount of $500,000 for construction of a library which has been completed. The second was in amount of $537,500 for construction of a science building which is currently under construction.

(39) The Fairfield University Library opened in September, 1968. The University presented evidence that the library has been used only for the purposes stated in its grant application; that no restrictions have been imposed on the books that may be acquired for the library; that no classes have been conducted in the library; that no religious worship or services have been conducted in the library; and that there are no religious symbols or plaques in or on the library. Plaintiffs presented no evidence to the contrary. The Fairfield University Library, and the federal funds which assisted its construction, have been used solely for non-religious purposes.

(40) The Fairfield University Science Building, which was under construction at the time of trial, is scheduled to be completed in February, 1971. The University has represented to the federal government that the building will house its physics, chemistry, mathematics and biology departments, a portion of its psychology department, and a computer center. The University presented evidence that no limitations, religious or otherwise, will be imposed on the content of the courses that will be taught in the new building; that no religious worship or services will be conducted in the building; and that there will be no religious symbols or plaques in or on the building. Plaintiffs presented no evidence to the contrary. The Fairfield University Science Building, and the federal funds which are assisting its construction, will be used solely for non-religious purposes.

(41) Albertus Magnus College has been the recipient of a Title I grant in amount of approximately $21,000 for construction of a language laboratory which has been completed.

(42) The Albertus Magnus College Language Laboratory became operational in 1966. It has been used by students in modern foreign language courses as a means of improving their pronunciation. The College presented evidence that the language laboratory has been used for no purpose other than to assist students in improving their pronunciation; that the language laboratory has been used only for the purposes stated in the grant application; that no religious worship or services have been conducted in the language laboratory, and that there are no religious symbols or plaques in or on the language laboratory.

Plaintiffs presented no evidence to the contrary. The Albertus Magnus College Language Laboratory, and the federal funds which assisted its construction, have been used solely for non-religious purposes.

CONCLUSIONS OF LAW

(1) The Court has jurisdiction over the subject matter and the parties.

(2) This action is an adversary one presenting a justiciable controversy between the parties.

(3) Plaintiffs as federal taxpayers are properly representative of the class on behalf of which they sue and have standing to maintain this action.

(4) Defendant government officials are the principal persons charged with the responsibilities, state and federal, of administering the Act.

(5) Defendant church related colleges and universities are recipients under the Act of grants for construction of academic facilities.

(6) In compliance with the Act and regulations promulgated thereunder, each of the grants in question has been properly approved by the Office of Education of the United States, following proper recommendation by the Connecticut Commission on Aid to Higher Education, such approvals and recommendations having been based upon applications affirmatively demonstrating that the grant in each instance would result in an urgently needed substantial expansion of the institution's student enrollment capacity and would be used solely for construction of secular academic facilities.

(7) The Act authorizes the grants made to defendant colleges and universities for construction of academic facilities.

(8) The Act and grants thereunder do not impair plaintiffs' rights under the establishment clause or the free exercise clause of the First Amendment.

(9) The Act and grants thereunder do not discriminate against non-sectarian institutions by depriving them of federal funds in violation of the First and Fourteenth Amendments.

(10) Plaintiffs are not entitled to injunctive relief against defendants.

(11) Defendants are entitled to judgment dismissing the complaint on the merits.

(12) No costs shall be taxed against any party to this action.

Dated at Hartford, Connecticut, this 19th day of March, 1970.

J. JOSEPH SMITH

J. JOSEPH SMITH
United States Circuit Judge

WILLIAM H. TIMBERS

WILLIAM H. TIMBERS
United States District Judge

M. JOSEPH BLUMENFELD

M. JOSEPH BLUMENFELD
United States District Judge

Appendix C

Excerpts from Public Law 88-204, 77 Stat. 363-9

AN ACT

To authorize assistance to public and other nonprofit institutions of higher education in financing the construction, rehabilitation, or improvement of needed academic and related facilities in undergraduate and graduate institutions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Higher Education Facilities Act of 1963".

Findings and Declaration of Policy

Sec. 2. The Congress hereby finds that the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education. The Congress further finds and declares that these needs are so great and these steps so urgent that it is incumbent upon the Nation to take positive and immediate action to meet these needs through assistance to institutions of higher education, including graduate and undergraduate institutions, junior and community colleges, and technical institutes, in providing certain academic facilities.

TITLE I—GRANTS FOR CONSTRUCTION OF UNDERGRADUATE ACADEMIC FACILITIES

Appropriations Authorized

Sec. 101. (a) The Commissioner of Education (hereinafter in this Act referred to as the "Commissioner") shall carry out during the fiscal year ending June 30, 1964, and each of the four succeeding fiscal years, a program of grants to institutions of higher education for the construction of academic facilities in accordance with this title.

(b) For the purpose of making grants under this title, there is hereby authorized to be appropriate the sum of $230,000,000 for the fiscal year ending June 30, 1964, and each of the two succeeding fiscal years; but for the fiscal year ending June 30, 1967, and the succeeding fiscal year, only such sums may be appropriated as the Congress may hereafter authorize by law. In addition to the sums authorized to be appropriated under the preceding sentence, there is hereby authorized to be appropriated for the fiscal year ending June 30, 1965, and the succeeding fiscal year, for making such grants the difference (if any) between the sums authorized to be appropriated under the preceding sentence for preceding fiscal years and the aggregate of the sums which were appropriated for such preceding years under such sentence.

(c) Sums appropriated pursuant to subsection (b) of this section shall remain available for reservation as provided in section 109 until the close of the fiscal year next succeeding the fiscal year for which they were appropriated.

ALLOTMENTS

SEC. 102. Of the funds appropriated pursuant to section 101 for any fiscal year, 22 per centum shall be allotted among the States in the manner prescribed by section 103 for use in providing academic facilities for public community colleges and public technical institutes. The remainder of the funds so appropriated shall be allotted among the States in the manner as prescribed in section 104 for use in providing academic facilities for institutions of higher education other than public community colleges and public technical institutes.

ALLOTMENTS TO STATES FOR PUBLIC COMMUNITY COLLEGES AND PUBLIC TECHNICAL INSTITUTES

SEC. 103.(a) The funds to be alloted for any fiscal year for use in providing academic facilities for public community colleges and public technical institutes shall be allotted among the States on the basis of the income per person and the number of high school graduates of the respective States. Such allotments shall be made as follows: The Commissioner shall allot to each State for each fiscal year an amount which bears the same ratio to the funds being allotted as the product of—

(1) the number of high school graduates of the State, and

(2) the State's allotment ratio (as determined under subsection (d))

bears to the sum of the corresponding products for all the States.

(b) The amount of each allotment to a State under this section shall be available, in accordance with the provisions of this title, for payment of the Federal share (as determined under sections 108(b) (3) and 401(d) of the development cost of approved projects for the construction of academic facilities within such State for public community colleges and public technical institutes. Sums allotted to a State for the fiscal year ending June 30, 1964, shall remain available for reservation as provided in section 109 until the close of the next fiscal year, in addition to the sums allotted to such State for such next fiscal year.

(c) All amounts allotted under this section for the fiscal year ending June 30, 1965, and the succeeding fiscal year, which are not reserved as provided in section 109 by the close of the fiscal year for which they are allotted, shall be reallotted by the Commissioner, on the basis of such factors as he determines to be equitable and reasonable, among the States which, as determined by the Commissioner, are able to use without delay any amounts so reallotted for providing academic facilities for public community colleges or public technical institutes. Amounts reallotted under this subsection shall be available for reservation until the close of the fiscal year next succeeding the fiscal year for which they were originally allotted.

(d) For purposes of this section—

'1) The "allotment ratio" for any State shall be 1.00 less the product of (A) .50 and (B) the quotient obtained by dividing the income per person for the State by the income per person for all the States (not including Puerto Rico, the Virgin Islands, American Samoa, and Guam), except that (i) the allotment ratio

shall in no case be less than .33⅓ or more than .66⅔, (ii) the allotment ratio for Puerto Rico, the Virgin Islands, American Samoa, and Guam shall be .66⅔, and (iii) the allotment ratio of any State shell be .50 for any fiscal year if the Commissioner finds that the cost of school construction in such State exceeds twice the median of such costs in all the States as determined by him on the basis of an index of the average per pupil cost of constructing minimum school facilities in the States as determined for such fiscal year under section 15(6) of the Act of September 23, 1950, as amended (20 U.S.C. 645), or, in the Commissioner's discretion, on the basis of such index and such other statistics and data as the Commissioner shall deem adequate and appropriate; and

(2) The allotment ratios shall be promulgated by the Commissioner as soon as possible after enactment of this Act, and annually thereafter, on the basis of the average of the incomes per person of the State and of all the States for the three most recent consecutive calendar years for which satisfactory data are available from the Department of Commerce.

(3) The term "high school graduate" means a person who has received formal recognition (by diploma, certificate, or similar means) from an approved school for successful completion of four years of education beyond the first eight years of schoolwork, or for demonstration of equivalent achievement. For the purposes of this section the number of high school graduates shall be limited to the number who graduated in the most recent school year for which satisfactory data are available from the Department of Health, Education, and Welfare. The interpretation of the definition of "high school graduate" shall fall within the authority of the Commissioner.

ALLOTMENTS TO STATES FOR INSTITUTIONS OF HIGHER EDUCATION OTHER THAN PUBLIC COMMUNITY COLLEGES AND PUBLIC TECHNICAL INSTITUTES

SEC. 104. (a) Of the funds to be allotted for any fiscal year for use in providing academic facilities for institutions of higher education other than public community colleges and public technical institutes (1) one-half shall be allotted by the Commissioner among the States so that the allotment to each State under this clause will be an amount which bears the same ratio to such one-half as the number of students enrolled in institutions of higher education in such State bears to the total number of students enrolled in such institutions in all the States; and (2) the remaining one-half shall be allotted by him among the States so that the allotment to each State under this clause will be an amount which bears the same ratio to such remainder as the number of students enrolled in grades nine to twelve (both inclusive) of schools in such State bears to the total number of students in such grades in schools in all the States. For the purposes of this subsection, (A) the number of students enrolled in institutions of higher education shall be deemed to be equal to the sum of (i) the number of full-time students and (ii) the full-time equivalent of the number of part-time students as determined by the Commissioner in accordance with regulations; and (B) determinations as to enrollment under either clause (1) or clause (2) of this subsection shall be made by the Commissioner on the basis of data for the most recent year for which satisfactory data with respect to such enrollment are available to him.

(b) The amount of each allotment to a State under this section shall be available, in accordance with the provisions

of this title, for payment of the Federal share (as determined under sections 108(b) (3) and 401(d) of the development cost of approved projects for the construction of academic facilities within such State for institutions of higher education other than public community colleges and public technical institutes. Sums allotted to a State for the fiscal year ending June 30, 1964, shall remain available for reservation as provided in section 109 until the close of the next fiscal year, in addition to the sums allotted to such State for such next fiscal year.

(c) All amounts allotted under this section for the fiscal year ending June 30, 1965, and the succeeding fiscal year, which are not reserved as provided in section 109 by the close of the fiscal year for which they are allotted, shall be reallotted by the Commissioner, on the basis of such factors as he determines to be equitable and reasonable, among the States which, as determined by the Commissioner, are able to use without delay any amounts so reallotted for providing academic facilities for institutions of higher education other than public community colleges and public technical institutes. Amounts reallotted under this subsection shall be available for reservation until the close of the fiscal year next succeeding the fiscal year for which they were originally allotted.

STATE COMMISSIONS AND PLANS

Sec. 105. (a) Any State desiring to participate in the grant program under this title shall designate for that purpose an existing State agency which is broadly representative of the public and of institutions of higher education (including junior colleges and technical institutes) in the

State, or, if no such State agency exists, shall establish such a State agency, and submit to the Commissioner through the agency so designated or established (hereinafter in this title referred to as the "State commission"), a State plan for such participation. The Commissioner shall approve any such plan which—

(1) provides that it shall be administered by the State commission;

(2) sets forth, consistently with basic criteria prescribed by regulation pursuant to section 107, objective standards and methods (A) for determining the relative priorities of eligible projects for the construction of academic facilities submitted by institutions of higher education within the State, and (B) for determining the Federal share of the development cost of each such project other than a project for a public community college or public technical institute (unless such plan provides for a uniform Federal share for all such projects);

(3) provides that the funds allotted (or reallotted) for any year under section 103 will be available only for use for the construction of academic facilities for public community colleges and public technical institutes, and that funds allotted (or reallotted) for any year to the State under section 104 will be available only for use for the construction of academic facilities for institutions of higher education other than public community colleges and public technical institutes;

(4) provides (A) for assigning priorities solely on the basis of such criteria, standards, and methods to eligible projects submitted to the State commission and deemed by it to be otherwise approvable under the provisions of this title; and (B) for approving and recommending to the Commissioner, in the order of

such priority, applications covering such eligible projects, and for certifying to the Commissioner the Federal share, determined by the State commission under the State plan, of the development cost of the project involved;

(5) provides for affording to every applicant, which has submitted to the State commission a project, an opportunity for a fair hearing before the State commission as to the priority assigned to such project or as to any other determination of the State commission adversely affecting such applicant; and

(6) provides (A) for such fiscal control and fund accounting procedures as may be necessary to assure proper disbursement of and accounting for Federal funds paid to the State commission under this title, and (B) for the making of such reports, in such form and containing such information, as may be reasonably necessary to enable the Commissioner to perform his functions under this title.

(b) The Commissioner is authorized to expend not exceeding $3,000,000 during each of the first two fiscal years of the program under this title in such amounts as he may consider necessary for the proper and efficient administration of the State plans approved under this title, including expenses which he determines was necessary for the preparation of such plans.

ELIGIBILITY FOR GRANTS

Sec. 106. An institution of higher education shall be eligible for a grant for construction of an academic facility under this title (1) in the case of an institution of higher education other than a public community college or public technical institute, only if such construction is limited to

structures, or portions thereof, especially designed for instruction or research in the natural or physical sciences, mathematics, modern foreign languages, or engineering, or for use as a library, and (2) only if such construction will, either alone or together with other construction to be undertaken within a reasonable time, (A) result in an urgently needed substantial expansion of the institution's student enrollment capacity, or (B) in the case of a new institution of higher education, result in creating urgently needed enrollment capacity.

Basic Criteria for Determining Priorities and Federal Share

Section 107. (a) As soon as practicable after the enactment of this Act the Commissioner shall by regulation prescribe basic criteria to which the provisions of State plans setting forth standards and methods for determining relative priorities of eligible construction projects, and the application of such standards and methods to such projects under such plans, shall be subject. Such basic criteria (1) shall be such as will best tend to achieve the objectives of this title while leaving opportunity and flexibility for the development of State plan standards and methods that will best accommodate the varied needs of institutions in the several States, and (2) shall give special consideration to expansion of undergraduate enrollment capacity. Subject to the foregoing requirements, such regulations may establish additional and appropriate basic criteria, including provision for considering the degree to which applicant institutions are effectively utilizing existing facilities, provision for allowing State plans to group or

provide grouping, in a reasonable manner, facilities or institutions according to functional or educational type for priority purposes, and, in view of the national objectives of this Act, provision for considering the degree to which the institution serves students from two or more States or from outside the United States; and in no event shall an institution's readiness to admit such out-of-State students be considered as a priority factor adverse to such institution.

(b) The Commissioner shall further prescribe by regulation the basic criteria for determining the Federal share of the development cost of any eligible project under this title within a State other than a project for a public community college or public technical institute, to which criteria the applicable standards and methods set forth in the State plan for such State shall conform in the absence of a uniform statewide Federal share specified in or pursuant to such plan. In the case of a project for an institution of higher education other than a public community college or public technical institute, the Federal share shall in no event exceed 33⅓ per centum of its development cost; and in the case of a project for a public community college or public technical institute, the Federal share shall be 40 per centum of its development cost.

(c) Section 4 of the Administrative Procedure Act shall apply to the prescription of regulations under this section, notwithstanding the provisions of clause (2) thereof.

APPLICATIONS FOR GRANTS AND CONDITIONS FOR APPROVAL

Sec. 108. (a) Institutions of higher education which desire to obtain grants under this title shall submit applications therefor at such time or times and in such manner as may be prescribed by the Commissioner, and such applications shall contain such information as may be required by or pursuant to regulation for the purpose of enabling the Commissioner to make the determinations required to be made by him under this title.

(b) The Commissioner shall approve an application covering a project for construction of an academic facility and meeting the requirements prescribed pursuant to subsection (a) if—

(1) the project is an eligible project as determined under section 196;

(2) the project has been approved and recommended by the appropriate State commission;

(3) the State commission has certified to the Commissioner, in accordance with the State plan, the Federal share of the development cost of the project, and sufficient funds to pay such Federal share are available from the applicable allotment of the State (including any applicable reallotment to the State);

(4) the project has, pursuant to the State plan, been assigned a priority that is higher than that of all other projects within such State (chargeable to the same allotment) which meet all the requirements of this section (other than this clause) and for which Federal funds have not yet been reserved;

(5) the Commissioner determines that the construction will be undertaken in an economical manner and will not be of elaborate or extravagant design or materials; and

(6) the Commissioner determines that (in addition to the assurance required by section 403 and such assurance as to title to the site as he may deem necessary) the application contains or is supported by satisfactory assurances—

(A) that Federal funds received by the applicant will be used solely for defraying the development cost of the project covered by such application,

(B) that sufficient funds will be available to meet the non-Federal portion of such cost and to provide for the effective use of the academic facility upon completion, and

(C) that the facility will be used as an academic facility during at least the period of the Federal interest therein (as defined in section 404).

(c) Amendments of applications shall, except as the Commissioner may otherwise provide by or pursuant to regulation, be subject to approval in the same manner as original applications.

AMOUNT OF GRANT—PAYMENT

SEC. 109. Upon his approval of any application for a grant under this title, the Commissioner shall reserve from the applicable allotment (including any applicable reallotment) available therefor, the amount of such grant, which (subject to the limits of such allotment or reallotment) shall be equal to the Federal share (ascertained by him under section 108(b)(3) of the development cost of the project covered by such application. The Commissioner shall pay such reserved amount, in advance or by way of reimbursement, and in such installments consistent with construction progress, as he may determine. The Commissioner's res-

ervation of any amount under this section may be amended by him, either upon approval of an amendment of the application covering such project or upon revision of the estimated development cost of a project with respect to which such reservation was made, and in the event of an upward revision of such estimated cost approved by him he may reserve the Federal share of the added cost only from the applicable allotment (or reallotment) available at the time of such approval.

ADMINISTRATION OF STATE PLANS

Sec. 110. (a) The Commissioner shall not finally disapprove any State plan submitted under this title, or any modification thereof, without first affording the State commission submitting the plan reasonable notice and opportunity for a hearing.

(b) Whenever the Commissioner, after reasonable notice and opportunity for hearing to the State Commission administering a State plan approved under this title, finds—

(1) that the State plan has been so changed that it no longer complies with the provisions of section 105(a), or

(2) that in the administration of the plan there is a failure to comply substantially with any such provision,

the Commissioner shall notify such State commission that the State will not be regarded as eligible to participate in the program under this title until he is satisfied that there is no longer any such failure to comply.

JUDICIAL REVIEW

Sec. 111. (a) If any State is dissatisfied with the Commissioner's final action with respect to the approval of its State plan submitted under section 105(a) or with his final action under section 110(b), such State may appeal to the United States court of appeals for the circuit in which such State is located. The summons and notice of appeal may be served at any place in the United States. The Commissioner shall forthwith certify and file in the court the transcript of the proceedings and the record on which he based his action.

(b) The findings of fact by the Commissioner, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the transcript and record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(c) The court shall have jurisdiction to affirm the action of the Commissioner or to set aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254.

MEMORANDUM

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1555

ELEANOR TAFT TILTON, ET AL., APPELLANTS

v.

ROBERT H. FINCH, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, JAMES E. ALLEN, JR., COMMISSIONER OF EDUCATION OF THE UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

MEMORANDUM FOR APPELLEES FINCH AND ALLEN

In this case, a three-judge district court convened pursuant to 28 U.S.C. 2282 and 2284 sustained the constitutionality of Title I of the Higher Education Facilities Act of 1963 (20 U.S.C. 701 *et seq.*). The Act authorizes grants to institutions of higher education for the construction of academic facilities (20 U.S.C. 711). While the Act prohibits grants for the construction of facilities to be used for sectarian in-

struction or religious worship (20 U.S.C. 751(a)(2)), the legislative history indicates that grants for sectarian institutions performing secular educational functions were contemplated (see J.S. 19).

The appellants brought this suit to enjoin the use of Title I funds to finance the construction of secular academic facilities at sectarian educational institutions and for a declaratory judgment that such use of Title I funds is unauthorized by the statute or, if authorized, is unconstitutional under the First Amendment. After a hearing, the district court dismissed the complaint on the merits, relying heavily on *Board of Education* v. *Allen*, 392 U.S. 236.

While we believe the decision of the district court to be correct, we agree that it presents important and recurring questions concerning the scope and application of the *Allen* decision and this Court's more recent decision in *Walz* v. *Tax Commission*, No. 135, this Term, decided May 4, 1970. The New York statute sustained in *Allen* required local school boards to lend textbooks to children in public or private (including sectarian) schools, under safeguards designed to insure that the books loaned were "not unsuitable for use in the public schools because of religious content." 392 U.S. at 245. Other federal and State statutes make different forms of aid available to sectarian schools, under varying arrangements for the exercise of public control to assure secular use of the funds.

This Court has recently noted probable jurisdiction in a case involving the validity of one such State statute. *Lemon* v. *Kurtzman*, No. 1189, this Term,

probable jurisdiction noted April 20, 1970. *Lemon* involves a Pennsylvania statute authorizing the use of public funds to reimburse private (including sectarian) schools for "secular educational services." The Pennsylvania Act allows payment for teacher salaries, textbooks and instructional materials, to the extent that these expenses are incurred for the teaching of mathematics, modern foreign languages, physical science, or physical education.

We believe that since plenary review has been granted in *Lemon*, it would be appropriate for this Court to review the instant case as well. Whereas *Allen* involved textbooks, the *Lemon* statute involves teachers' salaries and the instant case the construction of school buildings. Moreover, unlike *Allen* and *Lemon*, the instant case involves aid only to institutions of higher education. Adjudication of the *Lemon* case and instant case together would enable the Court to provide needed clarification of the extent to which, and the conditions under which, the Constitution permits public funds to be used to assist sectarian educational institutions.

Accordingly, we suggest that probable jurisdiction be noted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1970.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1555

ELEANOR TAFT TILTON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RAISNER, ELISABETH R. SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANSHARD, JAY S. ROTH, CARL W. SCHAEFER, NORMAN T. DAVID, HERBERT T. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PENDLETON, *Appellants*,

v.

ROBERT H. FINCH, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY, ALBERTUS MAGNUS COLLEGE, *Appellees*.

On Appeal from a Three-Judge United States District Court for the District of Connecticut

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees Fairfield University, Sacred Heart University, Albertus Magnus College and Annhurst College move to affirm the judgment below on the ground that the questions upon which review is sought have been rendered so unsubstantial by the well-reasoned decision of the District Court that no further review by this Court is necessary.

QUESTIONS PRESENTED

1. Whether the Higher Education Facilities Act of 1963 can be construed in a manner that would exclude from the Act's Title I grant program otherwise eligible institutions of higher education solely because such institutions are church-related.

2. If the Act cannot be so construed, whether the inclusion of church-related colleges and universities in a major federal program designed to expand educational opportunities is contrary to the Establishment and Free Exercise Clauses of the First Amendment.

STATEMENT OF THE CASE

A. The Challenged Statute

In the early 1960s, the Nation's colleges and universities faced an acute crisis of space and burgeoning enrollments as more and more young Americans sought the advantages of higher education. Congress responded to that crisis by enacting the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701-58. In transmitting to Congress his legislative proposals that were incorporated in that statute, President Kennedy succinctly summarized the problems confronted by institutions of higher education:

> "The long-predicted crisis in higher education facilities is now at hand. For the next 15 years, even without additional student aid, enrollment increases in colleges will average 340,000 each year. If we are to accommodate the projected enrollment of more than 7 million college students by 1970—a doubling during the decade—$23 billion of new facilities will be needed, more than three times the quantity built during the preceding decade. This means that, unless we are to deny higher education opportunities to our youth,

American colleges and universities must expand their academic facilities at a rate much faster than their present resources will permit." H.R. Doc. No. 54, 88th Cong., 1st Sess. 7 (1963).

The concerns expressed by President Kennedy were repeatedly echoed in the congressional hearings on his legislative proposals for higher education and in the floor debates which preceded the passage of the Higher Education Facilities Act.[1] A consistent theme of those hearings and debates was that, without a substantial infusion of governmental aid, the Nation's colleges and universities would simply be unable to undertake the needed expansion of their facilities.

The Higher Education Facilities Act seeks to assist institutions of higher education to expand their enrollment capacities by providing grants and loans for the construction of academic facilities. The appellants have challenged only Title I of the Act, which authorizes grants of federal funds to public and private colleges and universities to finance, in part, the construction of undergraduate academic facilities. 20 U.S.C. §§ 711-21. The critical showing that must be made by a college or university seeking a Title I grant is that the facility to be constructed with the grant "will . . . result in an urgently needed substantial expansion of the institution's student enrollment capacity, capacity to provide needed health care to students or personnel

[1] See generally, *Hearings on H.R. 3000 Before the House Comm. on Education and Labor*, 88th Cong., 1st Sess. (1963); *Hearings on S. 500 Before the Education Subcomm. of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. (1963); *Hearings on S. 580 Before the Education Subcomm. of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. (1963); 109 Cong. Rec. 14141-90, 18255-57, 18406-31, 18493-526, 18882-99, 19492-96, 20063-69, 22900-15 (1963).

of the institution, or capacity to carry out extension or continuing education programs." 20 U.S.C. § 716.

The Title I grant program is administered jointly by the federal and state governments. To enable its institutions of higher education to participate in that program, a state is required to establish an agency to carry out the state's administrative functions under the Act. 20 U.S.C. § 715. The most important of those functions performed by the state agencies are to screen applications for grants from colleges and universities within a state and to establish relative priorities among eligible projects to assure that available federal funds will have a maximum impact on increasing enrollment capacity. 20 U.S.C. §§ 715, 717.[2] Projects approved by the state agencies are forwarded to the United States Office of Education where those projects are subjected to further review to assure compliance with all requirements of the statute and the regulations promulgated thereunder. See District Court's Findings of Fact, ¶¶ 21-25, Juris. State. 36-37 (hereinafter cited as Findings).[3]

Title 4 of the challenged statute contains limitations on Title I grants that are directly relevant to the appellants' claims. Eligible institutions of higher education

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[2] The four appellee colleges and universities are located in Connecticut and, consequently, the evidence at trial relating to the administration of the challenged statute focused on the procedures followed by the Connecticut Commission on Aid to Higher Education. See Findings, ¶¶ 13-20, Juris. State. 35-36.

[3] The opinion and Findings of Fact of the District Court have not yet been reported, but they are reprinted in full in the appendices to appellants' Jurisdictional Statement. Citations to the opinion and the Findings of Fact of the court below in this Motion to Affirm will be made by reference to the appropriate pages in the Jurisdictional Statement.

are defined in a religiously neutral manner. The statute requires such institutions to be, *inter alia,* nonprofit, legally authorized by the state in which they are located to provide a program of education beyond high school, and accredited. 20 U.S.C. § 751(f). The statute also excludes from the definition of eligible academic facilities

> "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . any facility which (although not a facility described in the preceding clause) is used or to be used primarily in connection with any part of the program of a school or department of divinity . . . ." 20 U.S.C. § 751(a)(2).

Finally, the statute gives the federal government a twenty-year interest in all academic facilities funded under the Act, and it authorizes the government to recover a prorated share of the value of any facility which is used for a prohibited religious purpose, as defined by § 751(a)(2), during the twenty-year period. 20 U.S.C. § 754.

B. The Proceedings Below

The appellants, fifteen federal taxpayers, filed their complaint with the United States District Court for the District of Connecticut on September 25, 1968, asserting the basic claims they now ask this Court to review—namely, that Congress did not authorize grants of federal funds to church-related colleges and universities under the challenged statute and that, if such grants are authorized, Title I to that extent contravenes the Establishment and Free Exercise Clauses of the First Amendment. The named defendants, and the appellees herein, were the federal and state officials

responsible for administering Title I and four Catholic colleges and universities in Connecticut that have been the recipients of a total of five Title I grants.[4] Those institutions are Fairfield University, Sacred Heart University, Albertus Magnus College and Annhurst College.

A three-judge court was convened, as requested by the appellants, and all of the factual issues in the case were fully tried before that court. A total of 155 documentary exhibits were admitted in evidence, and testimony was taken from 22 witnesses. The appellants' evidence consisted entirely of documents obtained from the various appellees through pre-trial discovery and stipulations of fact entered into with the appellees. The appellants' central legal theory was that the Establishment Clause prohibited the granting of federal funds to so-called "sectarian" educational institutions, and the appellants' evidence focused on the alleged "sectarian" nature of the four appellee colleges and universities.[5] As a standard of sectarianism, the appellants relied on the criteria devised by the Maryland Court of Appeals in *Horace Mann League* v. *Board of Public Works,* 242 Md. 645, 220 A.2d 51, *cert. denied,*

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[4] Fairfield University received Title I grants for the construction of a library and a science building; Sacred Heart University received a Title I grant for the construction of a library; Annhurst College received a Title I grant for the construction of a fine arts building; and Albertus Magnus College received a Title I grant for the construction of a language laboratory.

[5] The appellants' other major legal theory in the briefs they submitted to the District Court was predicated on the so-called *Everson* principle. See pp. 12-14, *infra.* At the trial of this action, however, they claimed that no evidence other than the stipulations among the parties was necessary to support that theory. Trial Transcript 14-15.

appeal dismissed 385 U.S. 97 (1966). *Cf.* Juris. State. 5-6.

The legal theory of the appellee colleges and universities had a far different focus. Relying principally on *Board of Education* v. *Allen,* 392 U.S. 236 (1968), the appellee institutions contended that it was the nature of the educational function being subsidized by the federal funds—and not the religious or nonreligious nature of the institution receiving those funds—that was dispositive of the Establishment Clause issue raised by the appellants. For that reason, the appellees objected to all evidence offered by the appellants to show the alleged "sectarian" nature of those schools, Trial Transcript 142-50, 161-62, and a principal thrust of the evidence offered by the appellee institutions, through witnesses, was to show that the academic facilities funded with federal money at their campuses were being used or would be used for strictly secular purposes. In addition, the appellee institutions presented rebuttal evidence through testimony to correct the distorted picture the appellants attempted to draw of those schools through documentary evidence.

After accepting post-trial briefs and hearing extended post-trial arguments, the District Court ruled unanimously that the challenged statute and the Title I grants received by the appellee institutions did not contravene the Establishment and Free Exercise Clauses. The District Court faithfully followed and applied the controlling constitutional principles articulated by this Court's decisions, leaving no substantial issue in the case to warrant a plenary hearing in this Court. The District Court first ruled that church-related institutions of higher learning were not excluded from receiving Title I grants. It then held that

the purpose and primary effect test prescribed by *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968), governed appellants' Establishment Clause claim. In applying that test, the District Court examined only the educational function being subsidized by the federal funds and found that function to be wholly secular. Not only did the District Court reject the appellants' invitation to decide the Establishment Clause issue according to the so-called "sectarian" nature of the appellee institutions, but it also declined to enter any findings of fact pertaining to the character or nature of those schools. Finally, the District Court relied expressly on *Board of Education* v. *Allen*, 392 U.S. 236, 248-49 (1968), in finding no merit in appellants' Free Exercise claim.

ARGUMENT

A. ISSUE OF STATUTORY CONSTRUCTION

The threshold question presented by the appellants is whether the Higher Education Facilities Act can be construed in a manner that would exclude church-related colleges and universities from participation in the Title I grant program. The basis for the appellants' contention that the statute can be so construed has shifted as the case has developed. In their complaint, the appellants flatly asserted that Congress did not intend to include church-related colleges and universities within the class of eligible institutions. See Complaint, ¶ 25. At trial, the appellants contended that Congress "sought to fudge the issue" of inclusion of church-related schools and left the question for the courts to decide. Trial Transcript 9. Now the appellants ask this Court to infer an exclusion of church-related institutions from the Act's benefits because the Act does not expressly authorize their participation. Juris. State. 6-7.

The District Court gave full consideration to the appellants' arguments on this issue and found those arguments to be wholly without merit. The District Court's reasoning is compelling. First, the District Court noted that the Act's prohibition of the use of any facility funded with a Title I grant for sectarian instruction or religious worship, 20 U.S.C. § 751(a)(2), was a clear demonstration that Congress expected church-related colleges and universities to be recipients of those grants. Secondly, the District Court examined the Act's legislative history and found convincing proof that Congress knew that the statute, as enacted, would extend its benefits to both church-related and non-church-related institutions. For example, the Act's sponsors and floor managers confirmed during the congressional debates that church-related institutions could qualify for Title I grants.[6] In addition, two amendments designed to achieve the result appellants now seek—namely, the express exclusion of so-called "sectarian" institutions—were overwhelmingly defeated.[7] Against that background, and in light of the Act's religiously neutral definition of eligible institutions, 20 U.S.C. § 751(f), the District Court held that Title I grants to church-related colleges and universities were clearly authorized by the challenged statute.

Appellants' contrary arguments simply ignore established rules of statutory construction. First, the appellants suggest that statements by a bill's sponsors and floor managers and the defeat of proposed amendments are not entitled to much credence in evaluating

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[6] See, *e.g.*, 109 Cong. Rec. 14150-51 (1963) (remarks of Rep. Powell); *id.* at 14159 (remarks of Rep. Quie); *id.* at 18409-12 (remarks of Sen. Prouty); *id.* at 19427-30 (remarks of Sen. Morse).

[7] 109 Cong. Rec. 19492-6 (1963).

legislative history. Juris. State. 6-7. This Court has repeatedly held to the contrary. When recourse to legislative history is necessary, this Court has consistently viewed the statements of a statute's sponsors or promoters as valuable aids in statutory construction. See, *e.g.*, *Galvan* v. *Press*, 347 U.S. 522, 526-28 (1954); *United States* v. *United Mine Workers*, 330 U.S. 258, 278-81 (1947); *Richbourg Motor Co.* v. *United States*, 281 U.S. 528, 536 (1930). The cases also hold that a statute cannot be construed in a manner that would achieve a result Congress rejected by defeating amendments designed to achieve that result. See, *e.g.*, *Blau* v. *Lehman*, 368 U.S. 403, 410-13 (1962); *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490, 508-09 (1945); see also *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 94 (1935).

The appellants also invoke the familiar rule of statutory construction that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but grave doubts on that score." *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1916). But the appellants overlook the explicit limitation on the application of that rule. For that rule of construction applies only "if fairly possible." More pertinent to this case is the settled principle that a statute cannot be construed to avoid constitutional issues if such a construction would result in a "substantial rewriting" of the statute. *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964); *United States* v. *Robel*, 389 U.S. 258, 262 (1967). The best statement of the principle is found in *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 518 (1926):

> "We fully concede that it is the duty of a court in considering the validity of an act to give it such

reasonable construction as can be reached to bring it within fundamental law. But it is very clear that amendment may not be substituted for construction and that a court may not exercise legislative functions to save the law from conflict with constitutional limitations."

For this Court to construe the Higher Education Facilities Act to exclude so-called "sectarian" colleges and universities from the benefits of Title I would indeed be substituting amendment for construction. And the amendment that would be substituted would be one that Congress specifically rejected. If, as a result of rejecting the statutory construction urged by the appellants, this Court must reach and decide the constitutional questions presented by appellants, the Court will merely be exercising its traditional and necessary judicial function. That function cannot be avoided by engaging in an exercise of legislative power under the guise of statutory construction.

B. THE ESTABLISHMENT CLAUSE ISSUE

The appellants make a two-pronged assault on the District Court's conclusion that the awarding of Title I grants to church-related colleges and universities does not offend the Establishment Clause. The appellants' basic theory is, as it was in the court below, that the controlling Establishment Clause test is the so-called *Everson* principle, which they read as imposing an absolute bar to providing public funds to any institutions which teach or practice religion. Juris. State. 9. Necessarily implicit in that position is an argument that the appellants made explicitly in the court below—namely, that the so-called *Everson* principle, and not the purpose and primary effect test prescribed by this Court in *Board of Education* v. *Allen, supra,* is the

measure of constitutional validity. The appellants' alternative position is that, even if the purpose and primary effect test applies, the extension of federal funds to church-related colleges and universities is constitutionally infirm. Both of appellants' arguments are totally lacking in merit.

1. The Everson Principle

The appellants have premised their basic legal theory on a single sentence from the majority opinion in *Everson* v. *Board of Education,* 330 U.S. 1 (1947). That sentence reads as follows:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 330 U.S., at 16.

The District Court found that the appellants' reliance on that language of *Everson,* rather than the holding in the case, to be misplaced. For, despite the sweeping limitations implicit in the sentence relied upon by the appellants, this Court held in *Everson* that the use of public funds to reimburse parents for the cost of sending their children by public transportation to parochial schools did not violate the Establishment Clause, even though parochial schools realized tangible benefits from that form of public aid. 330 U.S., at 17.

The District Court's cryptic dismissal of the appellants' reliance on the so-called *Everson* principle anticipated the discussion of *Everson* in *Walz* v. *Tax Commission,* 38 U.S.L.W. 4347, 4348 (U.S. May 4, 1970), where this Court specifically warned of "[t]he hazards of placing too much weight on a few words or phrases of the Court." This Court also agreed that the spend-

ing program challenged in *Everson* resulted in "aid" to church-related schools but that such aid was not inconsistent with the Establishment Clause. 38 U.S. L.W., at 4348-49. Since the schools that benefited from the bus transportation subsidy surely taught and practiced religion, as the appellants use that term, the sweeping reading that the appellants give to the so-called *Everson* principle simply cannot be reconciled with this Court's Establishment Clause decisions.

Thus, it is quite clear that the "principle" that the appellants extract from a single sentence in *Everson* is in no sense a test of constitutional validity. That sentence was one of several in *Everson* in which this Court attempted, in very broad and abstract terms, to describe the general categories of problems which are cognizable under the Establishment Clause. See 330 U.S., at 15-16. But that sentence was in no sense self-defining in the limitations it suggested that the Establishment Clause imposed upon government power. At the trial of this action, even the appellants appeared to recognize that critical distinction between a general principle and a constitutional test. Initially the appellants contended that the so-called *Everson* principle barred public financial assistance to all institutions which teach or practice religion. See Trial Transcript 11-14. Subsequently, the appellants suggested that the constitutional bar should extend, not to colleges which teach religion objectively, but only to those colleges which propagate religious doctrine. See *id.*, at 32-33. Similarly, the word "support" in the sentence relied upon by the appellants is not self-defining, since this Court has held that the validity of public programs providing support for church-related schools is a question of degree. *Board of Education* v. *Allen*, 392 U.S.

236, 244 (1968). Thus, the so-called *Everson* principle cannot be employed as a constitutional test to assess the compatibility of the Title I grant program with Establishment Clause limitations.

2. Appellants' Application of the Allen Test

The appellants also argue that Title I grants to church-related colleges and universities are constitutionally infirm under the purpose and primary effect test prescribed by *Board of Education* v. *Allen, supra.* The appellants reach that result only by misapplying the *Allen* test.

The purpose and primary effect test was first articulated by this Court in *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222 (1963), when it ruled that devotional readings from the Bible in public school classrooms violated the Establishment Clause. In applying that test to the somewhat different problem of public financial assistance to church-related education, the Court in *Allen* quoted fully from *Schempp* the language setting forth the test:

> "The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." 392 U.S., at 243.

The critical inquiry under that test, therefore, is "what are the purposes and primary effect *of the enactment*" that is challenged on Establishment Clause grounds. The appellants, however, would have this Court assess the constitutionality of the Higher Education Facili-

ties Act by examining the purpose and the primary effect of institutions that receive Title I grants. Juris. State. 10-11. By shifting the focus of the purpose and primary effect test from the statute they have challenged to the institutions they have joined as defendants in this action, appellants are, in effect, asking this Court to abandon the constitutional test established only two years ago in the *Allen* case and to create a wholly new constitutional standard.

The appellants' distortion of the *Allen* test is simply a variation on the lengthy argument they made in the court below based on the decision in *Horace Mann League* v. *Board of Public Works,* 242 Md. 645, 220 A.2d 51, *cert. denied, appeal dismissed* 385 U.S. 97 (1966). Relying solely on that state court decision, the appellants insisted that the validity of a Title I grant should be measured by the sectarian or nonsectarian nature of a recipient college or university. And they argued that, in determining what constitutes a sectarian institution, the District Court should have employed the several criteria devised by the *Horace Mann* court. The District Court rejected the appellants' argument for the very sensible reason that the *Horace Mann* decision is in conflict with this Court's decision in *Allen.* Juris. State. 25, n. 14. The District Court's ruling on that point is indisputable, since the court in *Horace Mann* explicitly refused to apply the purpose and primary effect test adopted by this Court in *Allen.* See 220 A.2d, at 60-65.

One other point should be noted in connection with the appellants' misapplication of the purpose and primary effect test. The appellants may have inadvertently misled the Court concerning the record in this case by their argumentative depiction of a purely hypo-

thetical church-related college. Toward the end of their Jurisdictional Statement, the appellants describe

> "an institution which admits only students of a particular religion, requires them to participate in religious activities, compels them to comply with the doctrines and dogmas of the religion, forces them to attend church, requires them under penalty of dismissal to take instruction in theology and doctrines of the religion, and does everything to propagate and advance a particular religion other than confer a degree in divinity." Juris. State. 10-11.

Even a casual reading of the record in this case will reveal that none of the appellee colleges and universities bears even the vaguest resemblance to the hypothetical institution described by the appellants. In addition, if the appellants fear that the hypothetical institution they have described will use federal funds for impermissible religious purposes, a proper application of the purpose and primary effect test will prevent such an unconstitutional result. For, as will be demonstrated below, the purpose and primary effect test as applied in *Allen* bars any use of public funds for the religious functions of church-related institutions, and carefully limits the use of such funds to support the secular educational functions performed by church-related colleges.

3. Proper Application of the Allen Test

The court below precisely followed the *Allen* decision in applying the purpose and primary effect test, and it found no constitutional infirmity in awarding Title I grants to church-related colleges and universities.

The *Allen* decision requires that a court, in searching for the purpose of a challenged enactment, look

first to any statement of purpose contained in the statute. 392 U.S., at 239, 243. If the enactment contains such a statement of purpose, the court's inquiry is necessarily ended. The District Court noted that the Higher Education Facilities Act contains the following detailed expression of legislative purpose:

> "The Congress hereby finds that the security and welfare of the United States require that this and future generations of American Youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education. The Congress further finds and declares that these needs are so great and these steps so urgent that it is incumbent upon the Nation to take positive and immediate action to meet these needs through assistance to institutions of higher education, including graduate and undergraduate institutions, junior and community colleges, and technical institutes, in providing certain academic facilities." 20 U.S.C. § 701.

The District Court correctly found "an ample rational basis in the evidence before Congress for such findings," Juris. State. 25, and concluded that the challenged statute had a demonstrably secular purpose. It also held that "the Act does not have the purpose of promoting religion of any kind." *Id.*

In *Allen,* this Court ruled that church-related schools perform the dual functions of religious instruction and secular education. 392 U.S., at 245, 248. That proven dichotomy in the curricula of church-related schools

was the basis for the District Court's primary effect analysis. The District Court stated:

> "The focus of this test [of primary effect] as applied in *Allen* is the function, secular or religious, which the government aid subsidizes—not the nature of the institution, secular or religious, which receives the aid." Juris. State. 25.

That court then observed:

> "The Act before us was carefully drafted to insure that grants made to church-related educational institutions would subsidize the secular rather than the religious functions of such institutions. It authorizes grants only for the construction of academic facilities to be used for secular purposes; and specifically prohibits grants for the construction of any facility to be used for religious instruction or worship." Juris. State. 26-27.

The District Court also found, on the basis of uncontroverted evidence, that the five Title I grants received by appellee colleges and universities had been or would be used for solely nonreligious purposes. Findings, ¶¶ 26-42, Juris. State. 37-42. On that basis, the District Court held that the Higher Education Facilities Act had the necessary primary secular effect to survive an Establishment Clause challenge.

The District Court's primary effect analysis was clearly consistent with the *Allen* decision. At issue in that case was New York's textbook loan law which required local public school authorities to lend textbooks free of charge to all students in grades seven through twelve, including students attending church-related schools. In attempting to distinguish the *Everson* decision, the appellants argued that free textbooks were constitutionally distinct from free bus

rides because textbooks are part of the educational process and because the entire educational process in church-related schools is religious in nature. 392 U.S., at 245.

This Court examined that contention at length and concluded that its own prior decisions, plus

> "a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education." 392 U.S., at 248.

This Court also held that the challenged New York statute did not violate the Establishment Clause because that enactment authorized the lending of only secular textbooks to students in church-related schools. 392 U.S., at 244-45. Consequently, the District Court applied the proper measure of the statute's primary effect by focusing on the educational function subsidized by Title I grants.

As this Court has recently reaffirmed, the command of the Establishment Clause is that government be neutral in matters touching upon the religious affairs of its people. See *Walz* v. *Tax Commission*, 38 U.S.L.W. 4347 (U.S. May 4, 1970). The purpose and primary effect test, as conceived and applied in *Schempp* and *Allen*, precisely implements that constitutional command. In sustaining the Higher Education Facilities Act under that test, the District Court scrupulously observed that wholesome principle of neutrality. That court observed:

> "It would be ironic indeed if this Act of Congress, so specifically and precisely written to com-

> ply with the constitutional standard of secular legislative purpose and a primary effect that neither advances nor inhibits religion, were to be stricken down in the name of religious freedom." Juris. State. 28.

Religious freedom and government neutrality in religious matters would surely be the victims if a college's church relationship were the sole basis for excluding it from participation in a major federal program designed to increase educational opportunities for young Americans.

C. THE FREE EXERCISE CLAUSE ISSUE

The Jurisdictional Statement contains no explication of appellants' Free Exercise Clause claim. In their complaint, however, the appellants alleged that awarding Title I grants to church-related colleges and universities offended the Free Exercise Clause because such grants "constitute compulsory taxation for religious purposes." See Complaint, ¶ 30. The District Court rejected that claim for the same reason that this Court rejected the Free Exercise Clause claim of the appellants in the *Allen* case. Quoting directly from *Abington School Dist.* v. *Schempp, supra,* this Court ruled in *Allen* that "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." 392 U.S., at 248-49; see also *Engel* v. *Vitale,* 370 U.S. 421, 430 (1962); *Torcaso* v. *Watkins,* 367 U.S. 488, 495 (1961). The District Court ruled that appellants "have not shown that the Act coerces them as individuals in the practice of their religion in any way." Juris. State. 27.

The District Court found the Free Exercise Clause claim factually deficient for another reason. Because

that court had found the challenged statute to be secular in both purpose and primary effect, it could not accept the appellants' characterization of the statute as constituting compulsory taxation for "religious purposes."

The appellants have not even attempted to dispute the bases on which the District Court dismissed their Free Exercise Clause claim. The lack of merit in that claim is therefore apparent.

CONCLUSION

The judgment below should be affirmed because the decision of the District Court has rendered unsubstantial the questions the appellants ask this Court to review.[8]

Dated June 2, 1970

Respectfully submitted,

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[8] The question of the Establishment Clause validity of granting public funds to church-related elementary and secondary schools is a central issue in *Lemon* v. *Kurtzman*, No. 1189, October Term, 1969, *prob. juris. noted*, 38 U.S.L.W. 3401 (U.S. April 20, 1970). Should the Court grant a plenary hearing in this case, it is respectfully suggested that this case be set for argument with *Lemon* v. *Kurtzman, supra.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~1680~~ 153

ELEANOR TAFT TILTON, ET AL,

Appellants,

vs.

ROBERT H. FINCH, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY, ALBERTUS MAGNUS COLLEGE,

Appellees

On Appeal from a Three-Judge United States District Court for the District of Connecticut

MEMORANDUM FOR APPELLEE MARVIN K. PETERSON, CHAIRMAN OF THE COMMISSION ON AID TO HIGHER EDUCATION OF THE STATE OF CONNECTICUT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1555

ELEANOR TAFT TILTON, ET AL,

Appellants,

vs.

ROBERT H. FINCH, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY, ALBERTUS MAGNUS COLLEGE,

Appellees

On Appeal from a Three-Judge United States District Court for the District of Connecticut

MEMORANDUM FOR APPELLEE MARVIN K. PETERSON, CHAIRMAN OF THE COMMISSION ON AID TO HIGHER EDUCATION OF THE STATE OF CONNECTICUT

The above-named chairman of the Commission on Aid to Higher Education of the State of Connecticut believes that this Court has jurisdiction of this appeal, and that the legal questions are substantial and of such national importance that they should be reviewed by this Court.

The three-judge court of the United States District Court for the District of Connecticut has held that the Higher

Educational Facilities Act of 1963, 20 U.S.C. § 1701-58 (1964) (The Act) authorizes grants to church related colleges and universities for construction of academic facilities and that neither the Act nor the grants thereunder impair the plaintiff's rights under the establishment clause or the free exercise clause of the First Amendment of the Constitution of the United States.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1253. *Flast* v. *Cohen*, 392 U.S. 83 (1968).

QUESTIONS PRESENTED

1. Whether the Act authorizes grants to defendant church related colleges and universities for construction of academic facilities?

2. If so, whether the Act and grants thereunder impair the plaintiffs' rights under the establishment clause or the free exercise clause of the First Amendment of the Constitution of the United States?

STATEMENT

Appellants brought this action to enjoin the United States Secretary of Health, Education and Welfare and the United States Commissioner of Education from using Federal funds to finance the construction of facilities at defendant educational institutions pursuant to Title I of the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701-58 (1964) and for judgment declaring that such use was not authorized by the statute or, in the alternative, if authorized, was unconstitutional under the First Amendment of the United States Constitution. Joined as defendants were the chairman of the Commission on Aid to Higher Education of the State of

Connecticut and four colleges in Connecticut whose applications for funds under the Act have been approved by him as well as the other defendants, as required by the Act.

DISCUSSION

The decision below will have wide effect throughout the United States since there are church related colleges and universities in every state. Since such educational institutions are experiencing financial difficulties of crisis proportions, the problems raised are considerable and worthy of review by this Court.

Respectfully submitted,

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June 5, 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 153

ELEANORE TAFT TILTON, *et al.*,

Appellants,

v.

ELLIOT L. RICHARDSON,
Secretary of the United States Department of Health, Education and Welfare, *et al.*,

Appellees.

BRIEF OF PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE

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Other Authorities:

Clark, Religion and the Law, 15 S.C.L.Rev. 855, 859 (1963) 14

Cogdell, Gaston D., "What Price Parochiaid?" (1970) 22, 23

Freund, Paul A., Public Aid to Parochial Schools, 74 Case and Comment 4 (1969) 25

Madison, James, Memorial and Remonstrance, 330 U.S. 1 at 63 7

Miscellaneous:

American Commonwealth, James Bryce (1888) 23

New Trend: State Money for Private Schools, U.S. News and World Report (May 4, 1970) 6

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IN THE

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ELEANORE TAFT TILTON, *et al.*,

Appellants,

v.

ELLIOT L. RICHARDSON,
Secretary of the United States Department of Health, Education and Welfare, *et al.*,

Appellees.

BRIEF OF PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE

INTEREST OF AMICUS

Protestants and Other Americans United for Separation of Church and State is a nonprofit educational corporation organized under the laws of the District of Columbia with national headquarters in the Washington, D. C. area, with some 100,000 members in all the states of the United States. Its sole chartered purpose is to preserve the prin-

ciple of separation of church and state as set forth in the First Amendment to the Constitution of the United States and in the Constitutions of the several states, and to assist in the preservation of constitutional rights respecting this principle to the end of preserving religious liberty for the people of the United States.

Protestants and Other Americans United for Separation of Church and State, popularly known as "Americans United" has members in the State of Connecticut and is especially concerned over any development in the state which raise questions of possible infringements of the Constitution of the State of Connecticut but, more particularly, any possible violations of the religious clauses of the First Amendment to the Constitution of the United States.

This *amicus* brief takes the position that Title I of the Higher Education Facilities Act of 1963, 20 U.S.C. § 701-58 (1964) is unconstitutional. This position is not motivated by any hostility to any particular church or to any particular religion. As the Maryland Court of Appeals said in *Horace Mann League v. Board of Public Works*, 242 Md. 645, 220 A.2d 51 (1966):

> "It should be noted at the outset that nothing in this opinion is intended as a criticism of, or a boost to, any religion, sect, or schism, or lack of religion. Our task is to decide a constitutional issue. We proceed to do just that, and that alone."

STATUTE INVOLVED

The statutory provision involved in this suit is Title I of the Higher Education Facilities Act of 1963, 20 U.S.C. § 701-58 (1964).

THE QUESTIONS PRESENTED

The final question presented by this appeal is as follows:

(1) Is Title I of the Higher Education Facilities Act of 1963, in so far as it authorizes the expenditure of Federal funds to finance the construction of facilities at educational institutions controlled by religious groups and organized for and engaged in the propagation and promotion of the doctrine, teachings and practices of particular religions, unconstitutional as violative of the provisions of the First Amendment to the Federal Constitution forbidding laws respecting an establishment of religion and prohibiting the free exercise thereof?

But before this question can be answered certain fundamental questions of constitutional law must be answered:

(2) Assuming that the legislative purpose of the Act was not aimed at establishing, sponsoring, or supporting religion, does the Higher Educational Facilities Act of 1963, is so far as it authorizes and administers grants to church-related colleges for construction of academic facilities, create an excessive government entanglement with religion and establish an excessive involvement calling for official and continuing surveillance leading to an impermissible degree of entanglement between church and state?

(3) Do the religious clauses of the First Amendment to the United States Constitution make unconstitutional that part of a statute which uses churches or church schools as instrumentalities or agents of the State to carry out an allegedly secular government purpose—namely, the education of students in secular subjects?

If the last two questions are answered in the affirmative, the first conclusory question must also be so answered.

STATEMENT OF THE CASE

This action was brought by a group of fifteen individuals, citizens and taxpayers of the United States and residents

of the State of Connecticut challenging the validity of certain expenditures, made by the Department of Health, Education and Welfare, for the construction of facilities at four church-controlled colleges in Connecticut.

Defendant government officials are the Secretary of the Department of Health, Education and Welfare of the United States, the Commissioner of Education for the United States, and the Chairman of the Connecticut Commission on Aid to Higher Education; they are sued in their official capacities, particularly with respect to their duties in the administration of the Act. Defendant colleges and universities are Sacred Heart University, Annhurst College, Fairfield University and Albertus Magnus College, four church related Connecticut colleges and universities.

These institutional defendants are controlled and conducted by religious orders and the Roman Catholic Diocese of Bridgeport, Connecticut, and are organized for and are engaged in the propagation and promotion of the doctrine, teachings and practices of the Roman Catholic religion.

The defendants relied upon the Higher Education Facilisites Act (1963) (Title I, 20 U.S.C. § 701-21 (1964) to grant and receive federal funds for the construction of buildings at undergraduate church colleges, inter alia. Plaintiffs argue that the Act is not to be construed to permit this type of grant to church-related colleges, or if it does, then to that extent the statute is unconstitutional. Amicus contends that the Act entangles the United States, the State of Connecticut and the defendant church colleges in relationships pregnant with involvement, requiring sustained and detailed administrative surveillance by the government.

A state Commission set up under the Act and Regulations in 1964 adopted a plan for participation in the Title I grant program; the plan was submitted to and approved by the State Commission responsible. The Connecticut Commission receives applications for Title I grants from institutions of higher education throughout the State of

Connecticut including the four church-related institutions here defendants. The Connecticut Commission employed a staff which reviewed their applications to determine whether the various statutory criteria of eligibility, the requirements of the Commission and the requirements of the State plan adopted by the Connecticut Commission were met.

The Connecticut Commission then evaluated the applications of the church colleges taking into account projected future enrollment increases at the church colleges (both numerical and percentage); the church colleges' projected increase in facilities (both numerical and percentage) and church colleges' utilization of facilities (which is determined according to a capacity/enrollment ratio, average weekly use of classrooms and average weekly use of laboratories). The United States Office of Education then reviews the recommended grants. The Office of Education sought to assure itself that the church-colleges were in compliance with all applicable provisions of the Act and regulations, including the requirement that no eligible portion of a federally funded facility was to be used for religious worship or sectarian instruction or in connection with any program of a college department of divinity.

The Sacred Heart University received a Title I grant in the amount of $367,100; Annhurst College $444,182; Fairfield University $500,000 and Albertus Magnus College $21,000. Each of these grants in question was approved by the United States Office of Education following recommendation by the Connecticut Commission on Aid to Higher Education. Such approvals and recommendations were based upon applications affirmatively demonstrating that the grant in each instance would result in an urgently needed substantial expansion of the institution's student enrollment capacity and would be used solely for construction of so-called "secular" academic facilities. Amicus points out that these considerations are outside the jurisdiction and concern of the United States and connote sponsorship, financial support, and active involvement by the sovereign in religious activity.

SUMMARY OF ARGUMENT

The District Court was incorrect in concluding that the issue of the constitutionality of Title I of the Higher Education Facilities Act of 1963 had been resolved by application of the "secular purpose and primary effect" test found in *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963) and in *Board of Education v. Allen*, 392 U.S. 236 (1968). The basic issue in this case does not rest on "the purpose and primary effect" of the legislation. The "purpose/effect" test is but one facet of the church-state problem, important, but not here decisive. There are other considerations, particularly, the recently emphasized "involvement" test articulated by Chief Justice Burger in *Walz v. Tax Commission*, 397 U.S. 306 (1970).

Even if the purpose and primary effect of the legislation under consideration is secular and assuming, arguendo,[1] that the legislation was not designed in part as a surreptitious device to aid churches in their educational activities, nevertheless, the legislation is unconstitutional in that it involves the federal government in the affairs of churches and their colleges. As administered, it not only creates "an impermissible degree of entanglement" between the church and state (cf. *Walz*, supra) but blatantly uses church organizations as "agents" to help carry out a broad educational program of the United States. Amicus contends that there is no constitutional power in the United States to use churches to carry out any of its delegated responsibilities, educational or otherwise, where nonreligious means are reasonably available, *McGowan v. State of Maryland*, 366 U.S. 420 (1961). Not only is there no power, but the Establishment Clause of the First Amendment of the Constitution has been interpreted to forbid such "agency" relationship with its inherent "involvement" or "entanglement" of church and state. (cf. *Walz*, supra).

[1]This is a contrary to fact assumption. (cf. *New Trend: State Money for Private Schools* - U.S. News and World Report, May 4, 1970.

ARGUMENT

Amicus will focus its Brief on the unconstitutionality of the Government's involvement in religious affairs, particularly by the choice of a church as its agent or instrumentality to accomplish even a popular secular purpose. This involvement of church with state was criticized by James Madison in his *Memorial and Remonstrance Against Religious Assessments* in 1785. It was repeated in Chief Justice Burger's opinion in *Walz v. Tax Commission* in 1970. (397 U.S. 644). The "Remonstrance" was written to oppose an Assessment Bill for religious instruction pending in the Virginia General Assembly. Mr. Justice Frankfurter described the document as "an event basic in the history of religious liberty." (*McCollum v. Board of Education*, 333 U.S. 203, 214 (1948)). Mr. Justice Rutledge observed that "the Remonstrance is at once the most concise and the most accurate statement of the view of the First Amendment's author concerning what is 'an establishment of religion'." (*Everson v. Board of Education*, 330 U.S. 1, 37.) In his *Memorial and Remonstrance*, Madison pointed out clearly: "We remonstrate against the said Bill, . . . because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or *that he may employ Religion as an engine of Civil Policy*. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world; *The second an unhallowed perversion of the means of salvation.*" (Emphasis supplied).

Chief Justice Burger in *Walz*, supra, advanced the same theme one hundred and eighty-five years after Madison's effort. He points out:

> "It is sufficient to note that for the men who wrote the Religious Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, *financial support*, and *active involvement* of the sovereign in religious activity." (slip opinion p.2) (emphasis supplied)

The Act here under consideration, certainly provides financial support and creates active involvement of the sovereign in an important form of religious activity. The religious activity involved is the operation of a church college. Mr. Justice Jackson in *Everson v. Board of Education*, supra, clearly explained: "Catholic education is the rock on which the whole structure rests . . ." (p.24). Chief Justice Burger (*Walz*, supra) noted that churches "maintain schools that plainly tend to assure future adherence to a particular faith by having control of their total education at an early age. No religious body that maintains schools would deny this as an affirmative if not dominant policy of church schools." (*Walz*, slip opinion p.6). The "Act" clearly, then, authorized a form of government subsidy to those churches which operate private colleges which is a form of religious activity.

A subsidy by the state of any church activity is constitutionally suspect as an aid to religion (*Everson*, supra) or as an entanglement of state with church (*Walz*, supra). As Mr. Justice Brennan stated in his concurring opinion in *Walz*:

> ". . . *A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from the taxpayers as a whole.* An exemption, on the other hand, involves no such transfer." (*Walz*, slip opinion p.10) (emphasis supplied)

Chief Justice Burger clearly and properly interprets the Establishment Clause of the First Amendment as prohibiting legislation which creates a substantial involvement of the government with religion as opposed to a passive tax exemption. He pointed out:

> "granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet no lesser, involvement than taxing them. In analyzing either alternative, the questions are whether the involvement is excessive, and whether it is a continuing one call-

> ing for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously, a direct money subsidy would be a relationship pregnanat with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards. . ." (*Walz*, slip opinion pp. 9,10)

The Act, here in question, obviously requires a sustained and detailed administrative relationship for enforcement of statutory and administrative standards. An example of this abrasive entanglement of state with church is reported in *CHURCH & STATE*, September 1968:

> "They Had It
>
> The Ohio Valley College of Parkersburg, W. Va. has had it. When the trustees discovered that a $76,000 grant from the Federal Government, knocked out the school's auditorium as a place for chapel services, they were irate. When the facts of Federal aid were explained to them they protested this infringement of "freedom of worship."
>
> In vain Dr. J. M. Powell, president of the college, pleaded that the school's services really were not very religious. "Its just a devotional period . . . ." he protested, but it was out, nevertheless. Bible classes were also banned from the new building.
>
> Ohio Valley College launched a drive to raise the $76,000 and pay it back before the fall term opened. The trustees had learned the facts of life the hard way." (p. 14)

It is also clear from *Walz* that involvement is a matter of degree. Chief Justice Burger puts it succinctly: "The test is inescapably one of degree." (*Walz*, slip opinion p.9) Mr. Justice Harlan in his concurring opinion elaborates on the idea:

> "Whether subsidies or direct aid entail that degree of involvement that is prohibited by the Constitution is a question that must be reserved for a

> later case upon a record that fully develops all the pertinent considerations such as the significance and character of subsidies in our political system and the role of the government in administering the subsidy in relation to the particular program aided. It may also be that the States, while bound to observe strict neutrality, should be freer to experiment with involvement - on a neutral basis - than the Federal Government. Cf. e.g. my separate opinion in *Roth v. United States*, 354 U.S. 476, 496 (1957)." (*Walz*, slip opinion p.6).

Mr. Justice Brennan in *Walz* also touched on the prohibited employment of the organs of government for essentially religious purposes. He found:

> "To the extent that the exemptions further secular ends, they do not advance 'essentially religious purposes.'" To the extent that purely religious activities are benefitted by the exemptions, the benefit is passive. Government does not affirmatively foster these activities by exempting religious organizations from taxes, *as it would were it to subsidize them*. . .
>
> Finally, I do *not* think that the exemptions *'use essentially religious means to serve governmental ends, where secular means would suffice.'"* (*Walz*, slip opinion pp. 13 and 14) (emphasis added)

The most recent federal case involving the Establishment Clause of the First Amendment is *DiCenso v. Robinson* decided by a three-judge federal district court for the District of Rhode Island, June 15, 1970. (39 L.W. 2023). The three-judge federal court in *DiCenso* had the benefit of the *Walz* opinion. In *DiCenso* the court observes:

> ". . . the [Supreme] Court [in Walz] focuses on whether the statute fosters 'excessive entanglement' between government and religious institutions. Such entanglement is variously characterized as 'sponsorship', 'interference', and a relationship generating 'confrontation and conflicts'. Most pertinently in discussing the alternatives of taxing or

exempting church property, the Chief Justice: '[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously, a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . . 38 U.S.L.W. at 4350' (appendix p.17)

"*Walz* thus makes it clear that the test of a statute's effect is not whether the secular result is more important than the religious result, *nor whether the activity aided is in form secular, but whether the degree of entanglement required by the statute is likely to promote the substantive evils against which the First Amendment guards.*" (DiCenso, slip opinion pp. 17 and 18) (emphasis supplied).

The *DiCenso* case also clearly reiterates that it is the nature of the institution rather than the activity which makes the difference between the right of the government to aid or hinder under the Establishment Clause. "This distinction between secular institutions which are eligible for subsidy and religious institutions which are not seems to us commanded by the Establishment Clause."

It has been almost axiomatic and not seriously controverted that the First Amendment forbids government involvement with religion. The classic test is found in *Everson v. Board of Education*, supra, (1947) where the court stated:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his

> will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" (emphasis supplied). (pp. 15-16)

This *Everson* test or principle obviously covers a great many different situations where the government acts: (1) so as to set up a church; (2) to aid one particular religion; (3) aid all religions or religions in general; (4) prefer one religion over another; (5) require a person to go to church; (6) require a person to stay away from church; (7) force a person to profess a belief or disbelief in any religion; (8) punish a person for entertaining or professing religious beliefs or disbeliefs; (9) punish a person for church attendance or non-attendance; (10) use tax funds to support religious activities; (11) use tax funds to support religious institutions which practice or teach religion; (12) become involved or participate in the affairs of religious groups; (13) or permit religious groups to participate in state affairs.

In the present case, the stated purpose of the Act, as far as here pertinent, is stated: "to authorize assistance to public and other nonprofit institutions of higher education in financing the construction, rehabilitation or improvement of needed academic and related facilities in undergraduate and graduate institutions." The court below added another class to those stated: "Indeed the legislative history is quite conclusive that Congress intended to make the benefits of the Act available to church related colleges and uni-

versities. Not only did the sponsors and floor managers of the legislation so state in the debate, but amendments to deny the benefits of the Act to such institutions were voted down." (opinion below) Their conclusion requires that this court determine whether the Act, as so construed, if it cares to adopt the construction, actually has as its purpose or has a primary effect that neither advances nor inhibits religion.

The purpose/effect test was originally formulated by Chief Justice Warren in *McGowan v. State of Maryland* (supra) as follows:

> "We do not hold that Sunday legislation may not be a violation of the 'Establishment Clause' if it can be demonstrated that its purpose - evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect - is to use it for its coercive power to aid religion."

Its latest statement in *Allen,* supra, is as follows:

> "Based on Everson, Zorach, McGowan, and other cases, Abington School District v. Schempp, 374 U.S. 203 (1963), fashioned a test ascribed to by eight Justices for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits:
>
> 'The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson v. Board of Education,* 374 U.S. at 222."

That Justice Clark who articulated the *Schempp* test did not expect it to be used in lieu of the *Everson* tests is clear from his article in the South Carolina Law Review:

> "The phrase 'respecting the establishment of religion' prohibits situations where the church and state are one; where the church may control the state and vice versa; and *where there is some working arrangement between the two . . .*" (15 S.C.L. Rev. 855, 859 (1963) (emphasis added).

It is crucial to understand that the *Schempp* test *is not needed in all situations involving a state relationship with a church institution.* It is only useful when there is a question about what the purpose of a statute is or what, in practice, the statute actually accomplishes.

The *Schempp* formulation was most useful in *McGowan v. State of Maryland*, 366 U.S. 420 (1961) which required the court to determine the constitutionality of certain "Sunday Closing" Laws. This required a study of what the legislators had in mind when they adopted the legislation. The court correctly stated the test and applied it:

> "Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state."

Likewise in *Board of Education v. Allen*, 392 U.S. 236 (1968) a problem arose as to whether Section 701 of the Educational Law of the State of New York actually had among its purposes to aid religion, to use church schools as agencies of government, or to put the Government in partnership with church schools to carry out its secular educa-

tional responsibilities. The court applied the "purpose/effect" test and found as a matter of fact that it was neither the purpose nor primary effect of the statute to aid any church school. Mr. Justice White stated:

> "This test is not easy to apply, but the citation of Everson by the Schempp Court to support its general standard made clear how the Schempp rule would be applied to the facts of Everson. The statute upheld in Everson would be considered a law having 'a secular legislative purpose and a primary effect that neither advances nor inhibits religion.' We reach the same result with respect to the New York law requiring school books to be loaned free of charge to all students in specified grades. The express purpose of § 701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools."

The *Schempp* test has no useful role to play in a situation where, as here, there is no question as to the purpose or primary effect of the particular legislation or where the statute makes a church a partner, agent, instrumentality or "engine"—as James Madison would have put it—of civil policy. Even if this court should wish to be as generous as it was in *Allen*, it cannot fail to distinguish the degree of church-state involvement in the two situations. Here the pleadings show that the government finances buildings for church schools. This is not controverted. Even if one accepts the proposition that the underlying purpose of the legislation is to help institutions of learning to teach secular subjects only, to raise the educational standards only

for secular subjects, to benefit students without helping church schools in their basic responsibility of teaching and practicing religion, nevertheless, the United States may not use a church to do this, since available secular means will suffice.

Mr. Justice Brennan concurring in *Schempp*, supra, stated the general rule:

> "Equally the Constitution enjoins those involvements of religions with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) *use essentially religious means to serve governmental ends where secular means would suffice.*" (p. 231) (emphasis supplied)

Mr. Justice Frankfurter in his concurring opinion in *McCollum v. Board of Education*, 333 U.S. 203 (1948) repeated the principle: "Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally." (p. 227). Similarly, in *Schempp*, the Supreme Court held:

> "The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits." (p. 222)

Now it is clear that the State may perform services for the church - just as for any other nonprofit organization within its jurisdiction, provided the services are governmental in nature and are not intended to aid the church in its religious functions. But in determining what services the state can supply a church, we must find out whether in the process the church becomes an agent of the Government,

a conduit, a "civil engine," or is merely the recipient of a service enjoyed by all institutions regardless of being a church, such as fire and police protection. The state may put out a fire, inspect a faulty roof, apprehend a vandal in a church, but it may not use a church or pay church employees to perform these services. Such services churches are entitled to receive, in effect, as citizens. But here the design is either to use the church to carry on a secular educational program of the government or more fundamentally to aid churches in their own educational responsibilities, which as Chief Justice Burger noted in *Walz*, assures future adherence to some particular faith. These powers, as was shown in *Everson* and criticized in Madison's *Remonstrance* the state does not have. However the state is not without other constitutional means to carry out these laudable public purposes, it can finance public, and independent private colleges, as was judicially approved in *Clayton* and *Mann* (below), an otherwise thoroughly practicable constitutionally permissible alternative.

Of course it is difficult in some cases to determine just which institution is a church-related one. However in *Horace Mann League of* the *United States v. Board of Public Works*, 242 Md. 645, 220 A2d. 51 (Ct. App. 1966), cert. denied and appeal dismissed, 385 U.S. 97, (1966) a test was laid down to guide in determining whether a particular college is, in fact, so religiously oriented as to require or merit separate treatment under the religious clauses of the First Amendment:

> "The experts on both sides are in general accord that the following factors are significant in determining whether an educational institution is religious or sectarian: (1) the stated purposes of the college; (2) the college personnel, which includes the governing board, the administrative officers, the faculty, and the student body (with considerable stress being laid on the substantiality of religious control over the governing board as a criterion of whether a college is sectarian); (3) the college's re-

> lationship with religious organizations and groups, which relationship includes the extent of ownership, financial assistance, the college's memberships and affiliations, religious purposes, and miscellaneous aspects of the college's relationship with its sponsoring church; (4) the place of religion in the college's program, which includes the extent of religious manifestation in the physical surroundings, the character and extent of religious observance sponsored or encouraged by the college, the required participation for any or all students, the extent to which the college sponsors or encourages religious activity of sects different from that of the college's own church and the place of religion in the curriculum and in extra-curriculum programs; (5) the result or "outcome" of the college program, such as accreditation and the nature and character of the activities of the alumni; and (6) the work and image of the college in the community."

Such a test is not needed in this case for all the defendant colleges are admitted to be church-related.

Even where there is no question as to the nature of the institution receiving the aid, nor as to the purpose and primary effect of the statute involved, there is still a question as to the degree of state involvement with religious affairs created by a particular piece of legislation. None but the extremist can fail to see that in a 'pluralist society' with separation of powers and the separation of church and state built into the basic constitution, still all activities fade into each other to make up a composite whole. The principle may be clear, but the day to day application requires judgment.

In *Clayton v. Kervick*, decided July 20, 1970, in the Supreme Court of New Jersey, the New Jersey Educational Facilities Authority Law, N.J.S.A. 18 A:72 A-1, was upheld as constitutional. Like the Higher Education Facilities Act of 1963, the purpose of that legislation was to

assist colleges, including church colleges to finance construction of needed buildings. Chief Justice Weintraub pointed out in *Clayton:*

> "The statute is designed to provide funds to finance the construction of dormitories and educational facilities for public and private institutions of higher education. To that end, the statute created the New Jersey Educational Facilities Authority (herein Authority), 'a public body corporate and politic." N.J.S.A. 18A:72A-4(a). It should be stressed at once that *the statute does not provide for a gift or grant of State moneys to any institution.* Rather the plan calls for the Authority to operate on a self-sustaining basis. The Authority sells its bonds to private sources and pays the principal and interest out of revenues gained by the use of the moneys so obtained. *Secs.* 11, 30, and 31. As to private educational institutions, the Authority may lend the moneys to the institution, or the Authority may erect a facility on lands conveyed to it by the educational institution, return the improved property to the institution by a lease, and reconvey title upon full performance of the lease. Either way, the charge the Authority makes must cover the principal of and interest on the bonds the Authority issues for the moneys employed in the transaction. *Thus there is no gift or grant of moneys. And the bonds are the obligations of the Authority alone. They are not debts of the State, and the State's credit is not pledged. Secs.* 10 and 37. The bonds and property of the Authority are exempt from State and local taxation, *sec.* 18, and this, together with the exemption of the bonds from federal taxation, reduces the cost of money to the Authority and makes the plan feasible. (Slip opinion pp. 2,3) (emphasis supplied).

This is a recent example, post-*Walz*, of an 'Act' which, although it may indirectly aid religion as does the First Amendment itself, does not involve the State with the church to any appreciable degree. The New Jersey Su-

preme Court correctly distinguished their Act from the one before this court. ". . . the statute before us is more distant from the constitutional barrier than the Higher Educational Facilities Act of 1963, 20 U.S.C. §§ 701-58 (1964) which provides for outright grants . . ." (*Clayton*, slip opinion p.9).

A similar Act was upheld in *Vermont Educational Buildings Financing Agency v. Mann*, 127 Vt. 262, 247 A.2d 68 (Sup. Ct. 1968), juris. postponed, 394 U.S. 957, appeal dismissed under R.60, 396 U.S. 801 (1969). In connection with the Vermont plan of nonstate assistance to church colleges and in answer to a letter, the Secretary-Treasurer of the Vermont Educational Buildings Financing Agency, Mr. Robert Tracy, could properly reply:

> "While the Agency was established by the Legislature, the enabling act makes no provision for a State guarantee nor did it provide a nickel of operating funds for the Agency. For some three years, we have been operating without expense to the State. The extent of the subsidy, if any, is a willingness of the Federal government to permit bonds issued by the Agency to be tax exempt."

Amicus can find no violation of sound church-state relations in either the *Clayton* or *Mann* situations, particularly in view of the finding in *Walz* that tax exemption is not sufficient an aid or involvement to come within the strictures of the First Amendment.

Both *Clayton* and *Mann* also fall neatly into place in the line of opinions which hold that the State may not use religious institutions to accomplish even secular ends provided there are secular means available. In both *Clayton* and *Mann* the secular means were demonstrated. Congress, if it wishes to indirectly aid church colleges in their secular activities, may handle the problem as was done in *Clayton* and *Mann*—create some sort of nonstate public agency to help finance construction at any college regardless of the religious or nonreligious nature of the college. The funds,

responsibility and supervision must be nonstate though the agency may be authorized by the state. No church-state problem will then be involved. Amicus found no church-state problems in either *Clayton* or *Mann*.

The relationship between church and state in the "modern welfare state" is a most delicate one. The federal constitution has been construed to provide for such a State. Any judgment as to whether or not a particular program of public welfare actually promotes the general welfare is left to the Congress, with one or more important exceptions. The exception here pertinent is that the "establishment clause" forbids a merger of church and state to accomplish a welfare function. Financing college buildings is a public purpose and a welfare function. The "establishment clause" also guarantees that a church may not be used as "an engine of civil policy" no matter how much welfare may be enhanced. Who is to say that complete support by the Government of the church as the representative of God on earth would not be the highest form of welfare, the greatest possible child benefit? If the teachings of some of the major religions are true, it is inescapable not to conclude that taxpayer support of one particular church—the one which has the correct path—is the finest type of "welfare" and child benefit too. But, which one? However, the founding fathers, led by Jefferson and Madison, conceived of a "limitarian State"—one where the powers to undertake certain activities—for the general welfare, if you will—is prohibited to that State. The opposite form of State is "totalitarian." The establishment clause of the First Amendment accomplished just this limitation. Welfare, yes—but not when achieved by tax support for religious institutions directly or indirectly, for good or bad. Both the church and the state may most properly pursue the general welfare but not as instrumentalities of one another.

Unfortunately, the court below, applying the "purpose and primary effect" test associated with both *Everson* and *Abington School District v. Schempp*, 374 U.S. 203, 222

(1963) came up with a new reading of the religious clauses of the First Amendment: "The focus of this test as applied in *Allen* is the function, secular or religious, which the government aid subsidizes—not the nature of the institution, secular or religious, which receives the aid." (slip opinion at 13). Thus the court below would permit the government, state or federal, to assist church schools and to use church schools to carry out the educational responsibilities of the State, provided only that the particular courses taught are secular and not religiously oriented. Referring to the Higher Education Facilities Act of 1963, which grants federal funds to church-related colleges for construction of academic facilities, the Court below stated: "The Act before us was carefully drafted to insure that grants made to church-related educational institutions would subsidize the secular rather than the religious functions of such institutions." (slip opinion, page 15)

It does not take any great cerebration to realize that a pandora's box of religious strife will be opened if this new erosion of the principle of separation of church and state is permitted to undermine the religious clauses of the First Amendment. Any conceivable secular activity or function of a present-day church could be subsidized at taxpayer expense if it is the nature of the function rather than the nature of the institution which is the test for avoidance of the principle of separation of church and state. Gaston D. Cogdell, in his recent book, *Parochiaid,* points out the intercreedal rivalries which this new gap in the wall of separation will generate:

> "And as social services, do they not deserve tax support? They deserve it as much as do parochial schools—and more so. What is there about a church building that is sectarian or even religious, except perhaps the crosses or crucifixes in it, and occasionally the stained glass windows? If tax money is to be used for 'nonsectarian' church activities, let not all of it be given to the Roman Catholic Church, with a tiny little bit going to a few others.

> Let's divide the public bounty fairly and equally between all the 258 different religious denominations in the country for their 'nonsectarian' buildings, activities and programs. Every one of the 258 different denominations must get its 'fair share' of the tax money now going almost wholly to the Roman Catholic Church for the nonsectarian functions which they perform for society, if there is to be any justice, fairness, equity, or honesty in the state's largesse to the institution and activities of the various religious sects and their clergy." (p. 75)

If the practice of subsidizing church groups were once to be permitted by this court, many more churches will undoubtedly organize their own private schools and colleges. If tax funds were available to build them, these churches would vie with one another for their share of the melon. This is the very kind of strife which, as Lord Bryce wrote, had been averted in the United States by its arrangement of church-state separation. He pointed out in his *American Commonwealth:*

> "Half the wars of Europe, half the internal troubles that have vexed the European states . . . have arisen from theological differences or from the rival claims of church and state. This whole vast chapter of debate and strife has remained virtually unopened in the United States."

Many have been distressed in recent months to read and hear of a "black education" under "black auspices" handled by "black instructors." If one group or one church can segregate its constituents from the community for indoctrination purposes, and receive public subsidy for its buildings for so doing, why cannot others do the same? Is not this exactly what we invite when we provide for public subsidy for sectarian groups to build their own college buildings in their own segregated private colleges? What happens, then, to national unity and to our sense of common purpose? How much wiser the arrangement envisaged created by the constitution which limits public tax-

payer support to the common school open to all persons without discrimination or creedal distinction, where there is no indoctrination program but where the rights and values of all faiths are respected. How much wiser to have the church and state pursue common goals, not harnessed to one another. Thus the church and the state can pull together. There will be no need to pull apart—for they are not shackled one to the other. Each is free to pursue its peculiar goals in its own way under its own power.

This clamor for taxpayer support of private church colleges further offends the Fifth Amendment of the Constitution by involving the government in private discrimination. That the United States may not use public funds to support or subsidize private discriminations by building facilities for church schools is clear from such decisions of this court as *Reitman v. Mulkey*, 387 U.S. 369, (1967). Private schools are an island of religion in a sea of secularism. This is their private privilege, but not one that the state can subsidize, condone, or even encourage or discourage. As was recently pointed out in *Coffey v. State Education Finance Commission*, 37 L.W. 2451, (1969):

> "There is no claim in this case that the constitution requires all children to attend public schools, or that a private citizen may not select a private segregated school for his child because of the desire to keep the child from being educated with children of a different race. What is involved here are legislative enactments which 'will significantly encourage and involve the State in private discriminations'." *Reitman v. Mulkey*, 387 U.S. 369

It is also clear that religious preference is a form of "private discrimination." Let us keep it thus, personal and private.

The language in the separate opinions in *McCollum v. Board of Education*, 333 U.S. 203 (1948), is not only helpful as to the law of this case but interesting and informative. We shall sum up the principles which govern this litigation in the words of Mr. Justice Frankfurter who stated:

> "Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not of a fine line easily overstepped. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart. 'The great American principle of eternal separation' –Elihu Root's phrase bears repetition–is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity."

This court may also care to keep in mind the prediction of Professor Paul A. Freund of Harvard in *"Public Aid to Parochial Schools"* (74 Case and Comment 4, (1969) where he writes: "Arguing that the aid in the New York case [Allen] was sustained because it was available neutrally to pupils in all accredited schools, the proponents are likely to insist that such aid is not merely permissible, but is mandatory, since the First Amendment enforces just this standard of neutrality among religions and between a religious and a secular promotion of a common public purpose." (p.4) There are cases pending in Missouri and California which seek to require State support of church schools similar and equal to the support given to the public school system! Soon we may hear that construction financing, now available to the public school system and to state and independent colleges, will be demanded as a matter of right for church colleges and private parochial schools. The grant of these demands will signal the end of religious freedom as we have known it under the Establishment Clause of the First Amendment.

CONCLUSION

For the reasons above stated, the judgment of the District Court panel of three judges of the District of Connecticut dismissing the appellants' Complaint should be reversed and remanded for a hearing on the merits, with an opinion on the principles of constitutional law involved.

Respectfully submitted,

PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE.

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July 27, 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 153

ELEANOR TAFT TILTON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RAISNER, ELISABETH R. SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANSHARD, JAY S. ROTH, CARL W. SCHAEFER, NORMAN T. DAVID, HERBERT T. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PENDLETON,

Appellants,

—v.—

ELLIOT L. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY, ALBERTUS MAGNUS COLLEGE,

Appellees.

ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLANTS

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2 Writings of James Madison, *Memorial and Remonstrance Against Religious Assessments* 183 (Hunt ed. 1901) 22, 46, 47

In the

Supreme Court of the United States

October Term, 1970

No. 153

Eleanor Taft Tilton, Mildred H. Clark, Carol D. Goldstone, Theodore Gurney, Harvey L. Raisner, Elisabeth R. Swain, Wyman W. Parker, Paul A. Reynolds, Rufus Blanshard, Jay S. Roth, Carl W. Schaefer, Norman T. David, Herbert T. Goldstone, James W. Gardner, Jr., Charles L. Pendleton,

Appellants,

—v.—

Elliot L. Richardson, Secretary of the United States Department of Health, Education and Welfare, James E. Allen, Jr., Commissioner of Education of the United States, Marvin K. Peterson, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, Sacred Heart University, Annhurst College, Fairfield University, Albertus Magnus College,

Appellees.

ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLANTS

Opinion Below

The opinion of the United States District Court for Connecticut is not reported. It is set forth in the Appendix (separately printed) at A. 37.

Jurisdiction

The decision of the District Court and the judgment thereon were rendered and filed on March 19, 1970 (A. 68). A notice of appeal therefrom was filed on April 8, 1970. On June 22, 1970 this Court noted probable jurisdiction.

The jurisdiction of this Court rests on Title 28 of the United States Code, Section 1253. *Flast* v. *Cohen*, 392 U.S. 83 (1968).

The Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides in part:

> "I. Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; * * *"

The relevant provisions of the Higher Education Facilities Act of 1963 20 U.S.C. §§ 701-58 (1964) are set forth as an appendix herein (*infra*, pp. 53-71).

The Questions Presented

Two questions are presented by this appeal:

(1) Does Title I of the Higher Education Facilities Act of 1963 authorize the expenditure of Federal funds to finance the construction of facilities at educational institutions controlled by religious groups and organized for and engaged in the propagation and promotion of the doctrine, teachings and practices of particular religions so long as the particular facilities so financed will not be used for sectarian instruction or as a place for religious worship or primarily in connection with any part of the program of a school or department of divinity?

(2) If the Act does authorize such expenditure is it to that extent violative of the provisions of the First Amendment to the Federal Constitution forbidding laws respecting an establishment of religion and prohibiting the free exercise thereof?

Statement of the Case

This action was brought by a group of individuals, citizens and taxpayers of the United States and residents of the State of Connecticut challenging the validity of certain expenditures, made by the Department of Health, Education and Welfare, for the construction of facilities at four church-controlled colleges in Connecticut. The complaint alleged that these institutions, joined as defendants to the action, were controlled and conducted by religious orders and the Roman Catholic Diocese of Bridgeport, and that they were organized for and, at the time when the specific

grants to them were authorized by the Commissioner of Education, were engaged in the propagation and promotion of the doctrine, teachings and practices of the Roman Catholic religion. The complaint further alleged that such expenditures were not authorized by Title I of the Higher Education Facilities Act of 1963 or, in the alternative, if they were authorized, that the Act was to that extent unconstitutional.

At the trial, considerable evidence was offered to support the factual allegations. Conversely, the institutional defendants offered considerable evidence in contradiction thereto. In addition, they offered uncontradicted (and to some extent uncontradictable) evidence that the specific facilities for which the expenditures were authorized had not and would not in the future be used for sectarian instruction or religious worship.

The District Court did not decide the contested factual issues. It held, first, that Congress had indeed intended to authorize expenditures for the construction of facilities at church-controlled educational institutions no matter what the purpose of their organization and the nature of their operations so long as the specific Federally financed facilities were not used for sectarian instruction or worship. It held, second, that the statute so construed was constitutional.

Summary of Argument

To construe the Higher Education Facilities Act of 1963 as the court below did, that is to encompass all institutions of higher education other than schools of divinity, irrespective of the extent of the role that religion plays in their purpose or operations, raises grave constitutional issues

under the First Amendment. A statute should be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score. It is more than fairly possible to construe the statute challenged herein not to encompass institutions controlled by religious groups and in whose purpose and operations the propagation or practice of religion plays a major part. The court below was therefore in error in its construction of the statute.

If, however, the court below correctly construed the statute, it is to that extent unconstitutional as violative of both the Establishment and Free Exercise Clauses of the First Amendment.

Various tests have been suggested for measuring constitutionality under the Establishment Clause. The major ones are: (1) the *Everson* test which forbids financial support or subsidization of institutions which teach or practice religion; (2) the *Schempp* test which forbids governmental action whose purpose or primary effect is to advance religion; and (3) the *Walz* test which forbids governmental action that involves excessive entanglement in religion. Other tests consider whether religious institutions are unnecessarily utilized to advance secular purposes or emphasize the historic background of the challenged action and accord great weight to the long duration and universality of the challenged practice. Whichever of these tests is used, the result is the same: the Act as construed by the court below violates the Establishment Clause. The fact that the facility financed with Federal funds may not be used for sectarian instruction or religious worship does not mitigate the unconstitutionality of the statute under any of the tests; indeed, under the *Walz* test it aggravates it.

The statute, as construed by the court below, also violates the Free Exercise Clause since it constitutes a tax for religious purposes, and it is immaterial that the taxes paid by the plaintiffs or other taxpayers are not specifically earmarked for the effectuation of the statutory purposes, or that the amount of their taxes so used is minutely small.

ARGUMENT

I.

The Posture of the Controversy.

A. *The Complaint*

The complaint in this suit challenges the action of the Department of Health, Education and Welfare in allocating the funds of the United States to finance, in whole or in part, construction of facilities in sectarian schools and seeks both injunctive and declaratory relief. (Complaint, Paragraph 1. A. 7). It asserts that the Government, acting through the defendants Secretary of Health, Education and Welfare and the Commissioner of Education, justifies its action on the basis of the Higher Education Facilities Act of 1963 which authorizes grants of Federal funds for the construction of undergraduate academic facilities. It specifies four educational institutions in Connecticut, joined as defendants in this suit, as sectarian institutions to which such grants have been made or approved. (Paragraphs 20, 21, 22, 23, 24. A. 11-12). The complaint further alleges that it was not the intention of Congress in enacting the Higher Education Facilities Act of 1963 to require or authorize grants to institutions forbidden by the First Amendment to receive such grants, that is, sectarian educational

institutions, and if this was in fact the intent of Congress, the statute is to that extent unconstitutional. (Paragraphs 25, 28. A. 12-13). The educational institutions are joined as defendants on the ground that at the time the respective grants to them were authorized they were sectarian schools and hence constitutionally ineligible to receive the grants. The complaint requests a judgment declaring the Department of Health, Education and Welfare is not authorized to approve grants for construction purposes to sectarian colleges and enjoining it from approving such grants.

B. *The Relief Sought*

It is of fundamental importance to stress at the outset that the relief sought in this suit is not primarily or even substantially against the Defendant Colleges but against the Federal Government. Indeed, it was not necessary to join the colleges as Defendants. *Flast* v. *Cohen*, 392 U.S. 83 (1968) is a suit challenging use of Federal funds under the Elementary and Secondary Education Act of 1965 to finance instruction in sectarian schools below the college level. In that case, the only Defendants named are the Secretary of Health, Education and Welfare and the United States Commissioner of Education. The complaint herein could likewise have named only these two Federal officials as defendants. The colleges (and, therefore, the State of Connecticut) were joined as defendants to impart specificity and focus to the issues in the lawsuit (392 U.S. at 88) and to provide a tangible, factual background for the controversy[1] and, as in *Horace Mann League* v. *Board of Public Works*, 242 Md. 645, 220 A.2d 51 (1966), *cert. denied*,

[1] Cf. *W. E. DuBois Clubs* v. *Clark*, 389 U.S. 309, 312 (1968) wherein the Court expressed reluctance to decide "important and difficult constitutional issues * * * devoid of factual context."

appeal dismissed, 385 U.S. 97 (1966), to aid the Court in setting down standards and guidelines to distinguish institutions constitutionally eligible to receive Federal funds from those that are ineligible.

This suit was brought in Connecticut because it had to be brought somewhere. It could as well have been brought in practically any state in the Union for the Government took the position that no educational institution (other than theological seminaries) no matter how sectarian it may be is either statutorily or constitutionally disqualified from receiving Federal funds. Accordingly it has approved, and unless enjoined will continue to approve grants to sectarian institutions all over the nation. Hence, the plaintiffs seek a national declaration of judgment and a nationwide injunction.

We recognized, of course, that such a judgment and injunction, if sustained by this Court, would not be self-executing, except as to the four colleges joined in this suit (assuming they were all held ineligible). The Commissioner of Education, upon receipt of an application for a grant from a church-related institution, would be required in each case to determine according to the judicially fixed standards whether it is an ineligible sectarian institution, and the determination would be subject to judicial review in accordance with well-established procedures. This, however, is the normal if not the only practical procedure; certainly it is preferable to an administrative and judicial determination of each case unaided by over-all judicially established standards and guidelines.

C. *The Meaning of Sectarian*

It is also important to note that although we have used the term "sectarian" in our complaint and in the proceedings below as well as in this brief, we do not consider it synonymous with church-related. We do not contend that any relationship between an institution and a church disqualifies the former from receiving governmental funds. In the *Horace Mann League* case, four colleges, all church-related, were involved. Nevertheless, the Maryland court held that one of them, Hood College, was constitutionally eligible to receive state funds. Church relationship, the court held, is one factor, but only one to be considered and weighed in determining constitutional eligibility. Church relationship, moreover, is not fungible. In some cases it may be so close as to amount to complete church control; in others, it may be no more than a sentimental vestige of a relationship which has long ceased to have practical significance.

If church relationship is not of itself determinative, what is? In *Everson* v. *Board of Education,* 330 U.S. 1 (1947), the Court stated that government funds may not be used to support any institution that teaches or practices religion. Taken literally, this could mean that a college which employs a chaplain is disqualified, for under the law of agency his practice of religion is that of his principal, the college.

We make no such claim. We assert rather that under the Establishment Clause an institution is barred from receiving governmental funds if the propagation, teaching or practice of religion is a meaningful and major part of its existence.

It is to such an institution that we ascribe the term sectarian. We use that term as a word of art. When we characterized the Defendant Colleges as sectarian institutions, we meant thereby that at the time the respective grants of funds to them were approved by the Government, the propagation, teaching and practice of religion was in each case a meaningful and major part of their existence.

D. *The Disposition by the Court Below*

As we have indicated, the institutional defendants were joined in this suit and a trial was held to provide a tangible, factual background upon which standards and guidelines could be based to distinguish eligible from ineligible institutions. Such standards and guidelines were formulated by the Maryland Court of Appeals in the *Horace Mann League* case and its formulation has been followed by at least one state supreme court.[2]

The court below, however, adopted the position of the Government and ruled that what the institution exists for, what it does generally and how it does it are all irrelevant so long as it does not use the specific facility to which it earmarks governmental funds for sectarian instruction or religious worship. In other words, an institution which admits only students of a particular religion, requires them

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[2] *State ex rel. Warren* v. *Reuter*, 170 N.W. 2d 790 (1969) wherein the Supreme Court of Wisconsin said (at p. 801):

> Thus when we consider stated purposes and practices, the make-up of its governing board, faculty and student body, the content of its teachings, and its relationship with a religious organization, as relevant factors, Marquette School of Medicine is nonsectarian. These factors, while not exclusive, have legal significance in determining the nature of an institution. See *Horace Mann League of United States of America, Inc.* v. *Board of Public Works*, 242 Md. 645, 22 Atl. 2d 51.

to participate in religious activities, compels them to comply with the doctrines and dogmas of the religion, forces them to attend church, requires them under penalty of dismissal to take instruction in the theology and doctrines of the religion, and does everything to propagate and advance a particular religion other than confer degrees in divinity, can constitutionally receive governmental funds so long as in its bookkeeping it allocates these funds to the construction of a chemistry laboratory or biology classroom.

We do not contend that any of the four institutional defendants herein fit the above composite description of a sectarian educational institution. On the other hand, we do not concede that anything less than this composite would not also be deemed sectarian. The point is that the court's disposition practically removes the institutional defendants from the case, makes the entire trial record superfluous and meaningless, and brings the controversy to this Court in practical effect as a motion to dismiss for facial insufficiency. The issue before this Court therefore becomes one not of fact but of law, and that issue is whether an institution which we have described, and we have no doubt there are many such throughout the nation, may constitutionally receive governmental funds. The Government holds that it may, and has so applied the statute not only in Connecticut but in every state. The judgment we seek therefore is one which would only tangentially affect the institutional defendants herein but would be directed only against the Secretary of Health, Education and Welfare and the Commissioner of Education.

II.

The Question of Interpretation.

We believe the court below was in error in construing the statute to authorize payment of Federal funds to sectarian educational institutions (as we have defined the term sectarian).

The threshold question in every case challenging Federal administrative action as violative of the Federal Constitution is whether the challenged action is in fact authorized by statutory authority. The initial question that therefore must be decided in this case is whether the Higher Education Facilities Act of 1963 does authorize grants such as those approved by the Secretary and Commissioner and which continue to be approved.

In arguing that it does not, we do not rely upon any specific language in the statute. Nor do we rely on any specific legislative history whether in committee reports or in statements by Senators or Representatives in discussing the measure on the floors of Congress. To the extent that we rely on manifested Congressional intent, it is upon a negative rather than affirmative manifestation, namely the fact that the Congress could have easily stated expressly in the measure that sectarian colleges were within the purview of the law; had it done so, there would have been no question of interpretation before this Court. It is impossible to believe that the omission was an oversight; no issue was more thoroughly considered and strenuously debated than the inclusion or exclusion of sectarian colleges. The omission was a deliberate one, no less deliberate than the decision not to express a specific exclusion of sectarian institu-

tions. It was a decision not to tie the hands of the Court in interpreting the act.

Our reliance on the issue of interpretation is upon the well-settled principle that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States* v. *Jin Fuey Moy,* 241 U.S. 394, 401 (1916). Few principles of law have been so faithfully adhered to by the Court as this one. Literally scores of cases have been decided by the Court wherein it reached a constitutional conclusion through a statutory interpretation which, as the Court has said, was "in the candid service of avoiding a serious constitutional doubt." *United States* v. *Rumely,* 345 U.S. 41, 47 (1953). To summarize, or even list all these cases would unduly extend the length of this brief, and hence we merely cite in the footnote a representative sample in all of which, as in the present case, a challenge of unconstitutionality under the First Amendment was made to the court.[3]

The court below, in concluding that Congress intended to make the benefits of the Act available to church-related colleges, relied upon a legislative history which included statements made in debate by the sponsors and floor managers of the legislation. Assuming the probative force of such statements, the issue before this Court is not whether church-related colleges may receive governmental funds

[3] *Schneider* v. *Smith,* 390 U.S. 17 (1968); *Yates* v. *United States,* 354 U.S. 298 (1957); *United States* v. *Seeger,* 380 U.S. 163 (1965); *Cole* v. *Young,* 351 U.S. 536 (1956); *Greene* v. *McElroy,* 360 U.S. 474 (1959); *United States* v. *Rumely,* 345 U.S. 41 (1953); *Hannegan* v. *Esquire,* 327 U.S. 146 (1946); *Peters* v. *Hobby,* 349 U.S. 331 (1955); *Kent* v. *Dulles,* 357 U.S. 116 (1958); *Welsh* v. *United States,* 90 S. Ct. 1792 (1970).

but whether sectarian colleges, as we use the term, may do so. As we have indicated, we did not contend in the court below nor do we here that all church-related colleges and universities, no matter how tenuous the relationship, are excluded from the benefits of the Act. It is a far cry from an unwillingness of Congress to exclude all church-related institutions to a willingness to include them all, no matter how deep and extensive is their commitment to the propagation and practice of particular religions. Nothing in the legislative history of the Act necessarily supports a conclusion that Congress intended, irrespective of constitutional doubts, to include as beneficiaries institutions of the composite type that we have described above.

Certainly, the interpretation we suggest here is well within the limits of judicial construction to avoid constitutional doubts as expressed and applied in the cases we have cited.[4] Accordingly, we submit that this Court can and should resolve this case in terms of statutory construction rather than judicial review. Were the Court to do so, it would always be within the power of Congress, if dissatisfied with the decision, to amend the statute to express unambiguously the construction adopted by the court below. Should, however, the Court decide that the District Court's construction of the statute was correct and that the statute does in fact include as beneficiaries all educational institutions (other than divinity schools) irrespective of the nature and extent of their religious commitment, the Court must face the constitutional issue, and it is to this we now address ourselves.

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[4] Cf. concurring opinion of Mr. Justice Harlan in *Welsh* v. *United States*, 90 S. Ct. 1792, at 1798.

III.

The Establishment Clause.

A. *The* Everson *Test: Subsidization*

1. The Cases

It was not until the *Everson* case in 1947 that the Court found it necessary to examine closely into the meaning of the Establishment Clause as it applies to subsidization of religious institutions. The question did come to the Court in two earlier cases, *Bradfield* v. *Roberts,* 175 U.S. 291 (1899) and *Quick Bear* v. *Leupp,* 210 U.S. 50 (1908), but in neither did the Court examine into the history of the Clause or define its meaning. We will return to the former case (*infra* p. 24) but in respect to *Quick Bear* we note that the Court there held that treaty and other funds held for their Indian owners by the Federal Government as trustee could constitutionally be disbursed to pay the cost of tuition for the Indians at private, religious schools which they desired to attend. The Court upheld the expenditures because the funds belonged to the Indians and not to the government; the Indians had the right to use their own money to educate their children in the schools of their own choice, even if the government could not disburse its own money to the same schools because of the First Amendment prohibition of an establishment of religion.

In *Everson* the Court held unanimously that the First Amendment's ban on laws respecting an establishment of religion is applicable to the states by reason of the Fourteenth Amendment. Nevertheless, it ruled by a vote of five to four that a state (New Jersey) could constitutionally finance bus transportation of children to parochial as well

as public schools. The Court found the program to be a public safety measure to protect all children from traffic hazards and the dangers of the road. The Court said (330 U.S. at 17):

> We must consider the New Jersey statute in accordance with the . . . limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the state's constitutional power *even though it approaches the verge of that power. . . . New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.* On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, because of their faith or lack of it, from receiving the benefits of public welfare legislation. . . . " (Emphasis supplied.)

The Court set forth the following paragraph which was to become the most authoritative, frequently reiterated and almost classic exposition of the meaning of the Establishment Clause:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions,

> or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." (330 U.S. at 16. Emphasis added.)

The *Everson* test has become known as the no-aid test, and as such has become subject to criticism in that the term "aid" is so broad that the decision in the case could be deemed (as Mr. Justice Jackson asserted in his dissenting opinion) inconsistent with the test formulated therein. But, we submit, the decision in *Everson* and the principle which it announced do not rest on a distinction between aid and no-aid, or even direct and indirect aid, but on a distinction between subsidization and non-subsidization. The *Everson* court upheld the New Jersey statute because and only because "the State contributes no money to the schools" and "does not support them" (330 U.S. at 18).

The principle that government may not subsidize an institution whose purpose and practice is to propagate religion was not created by the *Everson* court; it goes back to the earliest days of our history as a nation. Whatever may

be said of the "no-aid" test no decision of this Court since *Everson* has in any way impaired the principle of no-subsidization.

In *McCollum* v. *Board of Education*, 333 U.S. 203, 210 (1948), the Court held it unconstitutional to allow the use of public school premises for sectarian teachings. The Court repeated that, *"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."* (Emphasis supplied.)

In *Zorach* v. *Clauson*, 343 U.S. 306 (1952), the Court upheld the constitutionality of a program of released time for religious education under which children would be released from public school for one hour a week to receive religious instruction in church schools, *because no expenditure of public funds or use of public buildings was involved.* The Court said: *"Government may not finance religious groups* nor undertake religious instruction *nor blend secular and sectarian education . . ."* (343 U.S. at 314. Emphasis supplied.)

In *McGowan* v. *Maryland*, 366 U.S. 420, 443 (1961), and in *Torcaso* v. *Watkins*, 367 U.S. 488, 493 (1961), the Court again, in each case, repeated the statement, made in the *Everson* and *McCollum* cases, that *"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."* (Emphasis supplied.)

In *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962), the Court, in holding unconstitutional the practice of prayer recitation

in the public schools, which had been prevalent almost since the founding of the public schools, stated that when "the power, prestige *and financial support* of government is placed behind a particular religious belief," the Establishment Clause of the First Amendment is violated. (Emphasis supplied.) The Court quoted from Madison's *Memorial and Remonstrance* that (at 436) ". . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

In *Abington School District* v. *Schempp,* 374 U.S. 203 (1963) the Court in invalidating devotional Bible reading in public schools, quoted from Mr. Justice Jackson's dissenting opinion in *Everson* that "There is no answer to the proposition • • • that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby supported in whole or in part at the taxpayers' expense" (374 U.S. at 216).

In *Board of Education* v. *Allen,* 392 U.S. 236 (1963) the Court held, as it had in *Everson,* that where a state undertakes a secular program for the benefit of children, the program is not constitutionally impermissible merely because as an incidental by-product thereof religious educational institutions might benefit. That is a far cry from saying that government may make a direct financial grant to such an institution. This the Court made clear in the following language:

> . . . The law merely makes available to all children the benefits of a general program to lend school books

> free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. *Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.* Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution. (392 U.S. 243-244. Emphasis added.)

As if to underline the critical distinction between aiding children and their parents on one hand and a direct financial grant to the religious institutions, the Court stated:

> It should be noted that the record contains no evidence that any of the private schools in appellants' districts previously provided textbooks for their students. There is some evidence that at least some of the schools did not; intervenor defendants [parents of children attending parochial schools] asserted that they had previously purchased all their children's textbooks. . . . (*Ibid.*).

Thus, *Allen,* unlike the present case, presents no instance of governmental financing relieving the sectarian school of an expenditure which it otherwise would have made.

Long before the statute upheld in *Allen* was enacted, New York, like all other states, established public libraries open to all children for the borrowing of books. Certainly children attending parochial schools visited these libraries and borrowed books which they used in connection with

their parochial school studies. It is by no means impossible that if there were no public libraries in the community the parochial school authorities might have found it necessary to purchase the books for use by the children. To that extent the parochial school is aided by the existence of the public libraries. Yet no one would contend that the state may not build public libraries and include books therein which are usable in connection with parochial school studies. As construed by the Court in *Allen*, the New York statute, at least in the absence of contrary evidence, effects the same result. But no reading of *Allen* can support the conclusion reached by the court below that this or any other decision allows governmental financing of the construction of a library as part of the parochial school.

On the same day that *Allen* was decided, the Court decided *Flast*, which, we believe, supports our conclusion. The gravamen of the complaint in that case was that Federal funds appropriated under the Elementary and Secondary Education Act of 1965 were being used to finance instruction in reading, arithmetic and other secular subjects in religious schools and to purchase textbooks and other instructional materials for use in such schools, all in violation of the Establishment Clause of the First Amendment. The Government moved to dismiss the suit on the ground that the plaintiffs, as mere taxpayers, had no standing to challenge judicially an expenditure of Federal funds.

While the Court specifically stated that it was not passing on the merits of the particular case since there was nothing before it but the complaint, it upheld the plaintiffs' standing to sue. It did so on the ground that the complaint did allege a facially sufficient claim under the First Amendment's Establishment Clause. Such a holding could

not have been made if governmental financing of the so-called secular aspects of sectarian schooling did not raise a constitutional issue under the First Amendment. Were such financing not inconsistent with the Establishment Clause, the plaintiffs' challenge would simply be to an expenditure for the general welfare, a challenge which the Court held could not, under *Frothingham* v. *Mellon,* 262 U.S. 447 (1923), be made by a taxpayer.

That the Court deemed subsidization of institutions that teach or propagate religion violative of the Establishment Clause is clear from the following (392 U.S. at 103-104):

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 Writings of James Madison 183, 186 (Hunt ed. 1901). The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause

of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8.

Nothing in *Walz* v. *Tax Commission of City of New York*, 90 S. Ct. 1409 (1970), the latest Establishment case, indicates an intent to repudiate or abandon the *Everson* principle barring the subsidization of institutions that teach or practice religion. True enough, the Court commented on the "hazards by placing too much weight on a few words or phrases" and illustrated this hazard by reference to the words in the paragraph in *Everson* quoted above which state that government may not "pass laws which aid one religion, aid all religions, or prefer one religion over another" (90 S. Ct. at 1412). But the Court in upholding the tax exemptability of religious institutions made it quite clear that it was not sanctioning governmental subsidization of such institutions. The whole tenor of the decision reflects a constitutional distinction between subsidy and exemption and an avoidance of anything that might be construed to impair the vitality of the basic *Everson* principle. Thus, the Court emphasized that

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to the churches but simply abstains from demanding that the church support the state. • • • (90 S. Ct. at 1415).

Again, the Court said (at 1414):

> Granting tax exemptions to churches necessarily operates to afford an *indirect* economic benefit and also gives rise to some, but yet a lesser, involvement

> than taxing them. *In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case.* The hazards of churches supporting government are hardly less in their potential than the hazards of governments supporting churches; each relationship carries some involvement rather than the desired insulation and separation. We cannot ignore the instances in history when church support of government led to the kind of involvement we seek to avoid. (Emphasis added.)

The only decision of this Court which upheld the constitutionality of a direct grant of governmental funds to a religious institution is *Bradfield* v. *Roberts, supra.* In that case the Court upheld the payment of Federal funds to construct a hospital operated by a corporation formed by members of a religious order. This decision was not unknown to the Court that decided *Everson;* it is cited in both the majority opinion (330 U.S. at 15) and the dissenting opinion of Mr. Justice Rutledge (at 44). Nevertheless, the Court (and of course the minority) stated unambiguously that tax raised funds could not constitutionally be used to support institutions which teach or practice religion.

What then is the basis of the *Bradfield* decision? It is that Providence Hospital neither taught nor practiced religion; it taught nothing and practiced only medicine.

Therein lies the distinction between *Bradfield* v. *Roberts* and the present case. While religion may motivate the establishment and conduct of a hospital, as well as of a college, education is inherently more closely related to the propagation and teaching of religious tenets and viewpoints. A governmental subsidy to a religious educational institution is a use of tax money which directly supports an institution formed and operating for the purpose of providing a *religious education.* Religion is an integral part of what the institution teaches, rather than merely the motivation for a function far less directly related to the propagation of religious tenets, such as healing the sick. Such a distinction is the only basis upon which the Court's expressions can be reconciled and continuing vitality given to *Bradfield* v. *Roberts.* If the distinction were not valid, there would have been no point to the whole *Everson* opinion—if *Bradfield* v. *Roberts* applied to education, there would have been no need to go to such lengths to find the challenged statute public safety legislation. The Court could simply have cited *Bradfield* v. *Roberts* and observed that even if funds are granted for education, education is a welfare function no matter who performs it. Instead, the court made clear that the Constitution prohibits the contribution of "tax-raised funds to the support of *an institution* which *teaches* the tenets and faith of any church." (Emphasis supplied.) If subsidization of religious educational institutions is welfare legislation, it involves a kind of "welfare" so different from hospitals that the Court has given the difference constitutional significance.

This critical distinction becomes clearer when it is noted that the agreement between the City of Washington and

Providence Hospital provided that the latter would accept and care for indigent patients sent to it by the former. Can a state close its public colleges and send the students to educational institutions organized and operating to practice and propagate religion? Can it send them to educational institutions whose composite profile we have described above? The District of Columbia could constitutionally send its indigents to Providence Hospital for medical care and therefore could constitutionally support it. It could not constitutionally send its indigents to a sectarian college and therefore we submit could not constitutionally support it.

Finally, there is one further fundamental distinction between *Bradfield* and the present case. In *Bradfield* the Court stressed that there was no allegation that the institution's "hospital work is confined to members of * * * [the] church. * * * The charter itself does not limit the exercise of its corporate powers to the members of any particular religious denomination, but on the contrary those powers are to be exercised in favor of any one seeking the ministrations of that kind of institution" (175 U.S. at 298-299). The statute challenged herein, at least as construed and applied by the Government, does not bar from its benefits an institution whose policies and practices excludes all but members of the denomination which sponsors and controls it.

In *Everson* the Court said:

> * * * New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the

amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation. * * * (330 U.S. at 16. Emphasis in original.)

If the First Amendment forbids government from excluding persons because of their faith or lack of it from receiving the benefits of public welfare legislation, can it consistently with that Amendment achieve the same result by financing an institution which provides welfare on a religiously discriminatory basis? We submit the First Amendment cannot be so easily evaded.[5]

2. The Statute

If, as we contend, the Establishment Clause forbids governmental financing of sectarian educational institutions, the Higher Education Facilities Act of 1963 is not immune from constitutional challenge merely because it provides that the funds granted thereunder shall not be used to finance the construction of facilities used for sectarian instruction or religious worship.

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[5] While this appeal is based on the First Amendment and, as *Bradfield* and *Everson* indicate, that Amendment forbids governmental subsidization of church-controlled institutions which bar entrance to non-church members, we suggest that independently thereof the Fifth (and Fourteenth) Amendments at least implicitly impose the same prohibition on the government. See Note, *Public Control of Private Sectarian Institutions Receiving Public Funds,* 63 Mich. L. Rev. 142 (1964); cf. *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F.2d 959, *cert. denied,* 376 U.S. 938 (1966).

In the first place, the fact still remains that the financed facility is available only to students of the college and thus excludes from its benefits "individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or members of any other faith, because of their faith or lack of it."

In the second place, none of the decisions of this Court make any distinction or even imply a distinction between the financing of a sectarian educational institution and a part thereof. *Everson* forbids the contribution of "tax-raised funds to the support of an *institution* which teaches the tenets and faith of any church," and states that "No tax in any amount, large or small, can be levied to support any religious activities *or institutions,* whatever they may be called, or whatever form they may adopt to teach or practice religion." The same language is used in *McCollum, McGowan* and *Torcaso.* In *Zorach* the Court said that "Government may not finance religious groups • • •". In *Allen* the Court noted that "no funds or books are furnished to *parochial schools.*"

If the decision of the court below is correct then government may contribute tax-raised funds to a congregation of a church so long as they are earmarked for repair of the furnace room since that room is not "used • • • as a place of religious worship."

Suppose a congregant earmarked his contribution to a church exclusively for repair of the furnace room, could the Internal Revenue disallow the deduction on the ground that it was not for a "religious • • • purpose"? (Int. Rev. Code 170(c)(2)(B)).

Finally, it would make a mockery of the Establishment Clause if its provisions could be so easily evaded by bookkeeping entries. A classroom or chemistry laboratory in a college is not a separate institution; it is part of the college and that which subsidizes it subsidizes the college. The money received by the college from the government goes into the same treasury as other moneys; it is used for the same overriding purpose, that is, to maintain the college so that it may propagate religion. Cost accounting is subordinate to, not superior to the Constitution.

B. *The* Schempp *Test: Purpose and Effect*

In *Schempp*, the Court, in invalidating a Bible reading statute under the Establishment Clause, said:

> The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion (374 U.S. at 222).

As we have indicated, there is nothing in *Schempp* or in any subsequent decision of this Court to support an assumption that the *Everson* principle that government may not finance institutions engaged in the practice or propagation of religion has been repudiated or abandoned. Certainly, nothing in the *Schempp* opinion suggests anything even remotely justifying such an assumption. Indeed, in *Schempp* the Court cited *Everson in support of the*

Schempp test. The justification for the assumption lies, if anywhere, not in *Schempp* but in *Allen*. Applying the test set forth in *Schempp*, the Court held that it could not assume that either the purpose or primary effect of a statute providing for the loan of secular textbooks to children attending nonpublic schools, including parochial schools, was to advance religion.

But *Allen* hardly supports an assumption that the *Everson* test was repudiated. In *Allen*, the Court not only cited *Everson* but quoted the critical phrase from the classic paragraph that the First Amendment bars any "tax in any amount, large or small • • • levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion" (392 U.S. at 242). Quoting a principle with approval, we suggest, is hardly an effective way of repudiating it.

If the court below was correct in its apparent assumption that the *Everson* test has been superseded by *Schempp*, then it would seem even more clear that the *Schempp* test has been superseded by *Walz*. After all, the *Schempp* Court expressly relied on *Everson* for its test whereas the *Walz* Court did not cite *Schempp* even in a footnote. On the contrary, the Court in *Walz* studiously avoided application of the *Schempp test*. While it noted that the "legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion" (90 S. Ct. at 1413), the second half of the test it applied was stated not in terms of advancement or inhibition (as in *Schempp*) but of "entanglement" (*id.* at 1414).

We do not urge that *Walz* has superseded *Schempp* for the same reason that we believe *Schempp* did not super-

sede *Everson*. All three tests express in differing phraseology a principle which has been part of American history from its beginning as a nation, the principle that tax-raised funds may not be used to support institutions that practice or propagate religion.

Assuming, however, that we are incorrect on both scores, and that *Schempp* promulgated a new and different test which was not superseded by *Walz*, we submit, nevertheless, that the court below was in error in holding that the statute challenged here can constitutionally be applied to institutions whose purpose and operation is the practice, teaching and propagation of religion.

1. Purpose

The court below, in finding that the challenged statute does not have as its purpose the advancement of religion, stated (A. 48-49):

> Applying the secular purpose and primary effect test to the Act here in question, we find that it clearly meets the first requirement of a secular legislative purpose. The purpose of the Act appears on its face. It contains a congressional declaration that the policy underlying the Act is to increase the student enrollment capacity of the Nation's institutions of higher education through grants for construction of academic facilities to help provide young people with the greatest possible opportunity for higher education; and such declaration is based on congressional findings that *there is an urgent need for construction of such facilities to enable these institutions to accommodate anticipated increase in student enrollments. • • • We hold, based on Congress' declaration of policy and findings,*

> *that the Act has the secular purpose of increasing the student enrollment capacity of the Nation's institutions of higher education*—an existing urgent public need—and that the Act does not have the purpose of promoting religion of any kind. (Emphasis added.)

We need not raise the difficult question as to what extent the Court may examine into the actual purpose of an act of Congress where that differs from the stated purpose and if stated would require a determination that the act violates the Constitution.[6] We accept the Congressional statement of purpose as it appears in the statute and as summarized by the court below. We do not, however, accept the court's conclusion that "the Act does not have the purpose of promoting religion of any kind."

The court below reached its conclusion by placing all colleges under a single umbrella of "institutions of higher education" and inferring that since most such institutions are secular the umbrella is secular and all under it are entitled to the aid which the umbrella gives.

In *Walz*, the Court speaking of the policy of "religion to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at any early age," stated that "No religious body that maintains schools would deny this as an affirmative if not dominant policy of church schools" (90 S. Ct. at 1412-1413). While the Court was speaking of elementary

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[6] *Cf. Barenblatt* v. *United States*, 360 U.S. 109, 153-162 (dissenting opinion of Mr. Justice Black), 166 (dissenting opinion of Mr. Justice Brennan) (1959) (First Amendment); *United States* v. *Kahriger*, 345 U.S. 22, 39-40 (dissenting opinion of Mr. Justice Frankfurter) (1953) (Fifth Amendment); *Bailey* v. *Drexel Furniture Company*, 259 U.S. 20 (1922) (Tenth Amendment). See also, Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 Harv. L. Rev. 1887 (1970).

and secondary schools, the statement is certainly true of many colleges as well. Indeed, it may be assumed that the propagation of religion to the young is the dominant purpose and policy of those churches which at great expense maintain sectarian colleges—else, why do they do so?[1] In any event, in view of the posture which this case has taken it must be assumed that the Government has in the past and unless enjoined will in the future continue to finance under the Act educational institutions whose primary or dominant purpose is the advancement of religion.

The stated purpose of the Act is to increase enrollment at educational institutions. Under Section 106 (20 U.S.C. 716) an institution of higher education is eligible for a grant only if the financed construction will "result in an urgently needed substantial expansion of the institution's student enrollment capacity." Insofar as an institution is a secular one, no constitutional problem arises. But if the dominant purpose of the institution is to advance religion through propagation we cannot see how a law whose pur-

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[1] In this respect maintenance of educational institutions is fundamentally different in purpose from maintenance of hospitals, homes for orphans and the aged, etc. Every religion (as well as secular ethics) commands the performance of "good works," and these are universal and secular. There is nothing particularistic about caring for the ill, the aged, the infirm, the poor and the orphaned. This command is found not only in the Scriptures of Jews, Christians and Moslems, but of all religions. But when Moses commanded Israel "thou shalt teach them diligently unto thy children" (Deut. 6:7) he was referring only to the Torah and not to secular subjects; and when Jesus commanded his disciples "Go ye therefor and teach all nations," he meant the Gospel, and not the wisdom of the Greeks. Indeed, there are some religions which forbid their adherents to teach or learn secular subjects at all or beyond the elementary grades. See, *People* v. *Donner*, 199 Misc. (N.Y.) 643, *aff'd*, 278 App. Div. 705, *aff'd*, 302 N.Y. 857, *appeal dismissed*, 342 U.S. 884 (1951); *State* v. *Garber*, 197 Kan. 567, *appeal dismissed*, 389 U.S. 51 (1967).

pose is to enable the institution to enroll more students (and thus propagate religion to more persons) can have any purpose other than to advance religion. We do not believe it is within the power of Congress or the Government or the court below to categorize all educational institutions (other than divinity schools) as secular merely because many or even most of them are, nor that a purpose to increase enrollment in all is secular because some of the institutions are secular.

Perhaps if there were no practicable way of separating the sectarian from the secular, an argument could be made that the overriding secular purpose of Congress will of necessity encompass the sectarian institutions. But there is no convincing proof, or even finding by Congress, that this is the case. Administration of state statutes subsidizing secular colleges under constitutional provisions forbidding subsidization of sectarian ones (e.g., Pennsylvania and New York) shows conclusively that it is feasible to do so administratively; *Horace Mann League* v. *Board of Public Works, supra,* and *State ex rel. Warren* v. *Reuter, supra,* show that it can be done judicially.[8]

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[8] A study of church-related higher education made for the Danforth Foundation and published by the American Council on Education, utilized six factors in measuring the religiousness of colleges and universities (church control of board, ownership by church, financial support by church, institutional acceptance of denominational standards, institutional statement of purpose reflecting denominational or religious orientation, and church membership as a factor in selecting faculty and administrative personnel). It listed the 817 institutions studied and rated each of them as to each of these factors. M. Pattillo and D. MacKenzie, *Church-Sponsored Higher Education in the United States,* pp. 230-247 (1966). As can be seen, the factors utilized in the study were to a large extent similar to those used by the Maryland Court of Appeals in *Horace Mann League* and the Wisconsin Supreme Court in *State ex rel. Warren* v. *Reuter.*

There is a critical difference (aside, of course, from subsidization of the institution) between *Everson* and *Allen* and the present case. In neither of those cases was it the purpose of the statute to increase or even maintain enrollment in the particular sectarian institutions. As the Court said in *Allen*, speaking of *Everson*,

> • • • The statute was held to be valid even though one of its results was that "children are helped to get to church schools" and "some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets" (392 U.S. at 242).

Thus the increased or stable enrollment of the school was merely an incidental byproduct of a statute having an obviously secular purpose. In the present case, increased enrollment is *the* purpose of the statute.

That the Federal funds are earmarked for facilities which are not to be used for sectarian instruction or religious worship no more removes the constitutional barrier under the purpose-effect test than it does under the subsidization test. As we have seen, the purpose of the statute is to increase enrollment at the institution, not to provide those already enrolled with instruction in chemistry or biology. The additional facilities are a means not an end. They serve the same basic purpose for a college as the fur-

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Of the Roman Catholic institutions studied 45.4% were rated as having all six elements; of the non-Catholic the percentage was 35.4. *Id.* at 33. Of the institutional defendants in the present case only Albertus Magnus was found to have all six elements; Annhurst had three and Fairfield four. Sacred Heart, which started operations in 1963 after the study was completed, was not rated.

nace serves for a church—that is, not to heat the congregation but to get them into the church for the practice and propagation of religion. Even the most deeply religiously committed educational institutions recognize that unless they provide secular education alongside their sectarian instruction their efforts at propagating religion among young adults would be in large measure ineffectual. But they were organized and operated in pursuance of the church's religious endeavors; the teaching mission of the church refers to religious, not secular teaching.[9]

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[9] The use of secular instruction to further religious purposes is hardly new. What is probably the progenitor of the American public educational system was the Massachusetts law of 1647 which provided in part:

> It being one chief project of that old deluder, Satan to keep men from the knowledge of the Scriptures, as in former times by keeping them in an unknown tongue, so in these later times by persuading from the use of tongues, that so at least the true sense and meaning of the original might be clouded by false glosses of saint-seeming deceivers, that learning may not be buried in the graves of our fathers in the church and commonwealth, the Lord assisting our endeavors,—
>
> It is therefore ordered, that every township within this jurisdiction, after the Lord hath increased them to the number of fifty householders, shall then forthwith appoint one within their town to teach all such children as shall resort to him, to read and write, whose wages shall be paid, either by the parents or masters of such children, or by the inhabitants in general, by way of supply, as the major part of those who order the prudentials of the town shall appoint. * * * R. Finney, *A Brief History of the American Public School* 4 (1946).

Of course, long before *Schempp* this religious purpose for secular education had disappeared and the validity of public support for the school system is not vulnerable because of the religious origin of the system. *McGowan* v. *Maryland*, *supra*. We have no doubt that many nonpublic colleges and universities, such as Harvard, Yale, Princeton and Columbia, none of which are listed by Pattillo and Mackenzie, have gone through a similar change. As the Maryland court's decision upholding the grant to Hood College in *Horace Mann League* and *Warren* v. *Reuter*, upholding grants to Marquette Medical School indicate, the First Amendment does not

2. Effect

What we have said in respect to purpose applies equally in respect to effect. If the purpose of the statute to increase enrollment in educational institutions irrespective of the extent and intensity of their sectarian commitment is fulfilled, then the effect cannot be other than to advance religion.

The most recent judicial consideration of the constitutionality of a statute purporting to finance only the secular aspects of church school education herein is the case of *Dicenso* v. *Robinson*, decided by the United States District Court for Rhode Island on June 15, 1970 (notice of appeal filed June 25, 1970). The court unanimously held the statute unconstitutional, the majority (Circuit Judge Coffin and District Court Judge Bownes) on the ground that it violated both the *Schempp* and the *Walz* tests, the minority (District Court Judge Pettine) on the ground that it violated the *Walz* test. In his opinion Judge Coffin said:

> The second part of the *Schempp* test—determining the statute's "primary effect"—presents a more difficult problem of both definition and application. Plaintiffs have argued that "primary" means "essential" or "fundamental". Defendants and intervenors have taken a more literal position, claiming that "primary" means "first in order of importance". The problem of definition is critical in this case, because, as we have noted in our findings, the Act has two significant effects: on the one hand, it aids the quality

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bar governmental grants to such institutions. We emphasize again that our challenge is only to grants to institutions where the propagation of sectarian religion remains a dominant purpose and policy.

of secular education; on the other, it provides support to a religious enterprise. Judicial efforts to decide which of these effects is *"the* primary effect", as *Schempp* seems to require, are likely to be no more satisfactory than efforts to rank the legs of a table in order of importance.

Intervenors, in an effort to give shape to the *Schempp* test, have urged us to focus solely on the activity subsidized in judging effect. In other words, intervenors propose that we examine only the activities of the teachers receiving aid and ignore the religious nature of the schools in which they teach. Such a narrow perspective, however, strikes us as unrealistic when examining direct financial aid to denominational schools. The expenses of a religious institution may be apportioned in a variety of ways among its "secular" and "religious" activities. Under plaintiffs' [intervenors' (!)] proposed test, sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to "secular" activities. • • •

In a footnote Judge Coffin added:

Our brother in dissent accepts intervenors' narrow view of the *Allen* test. However, in *Allen* there was no record on which to predicate a finding that the effect of the statute would differ from its declared purpose. Moreover, as our findings indicate, the "religious enterprise" assisted in this case is not the discrete teaching of religion, but the maintenance of an educational environment within which religious instruction takes place in varied ways. *McCollum* v.

Board of Education, 333 U.S. 203 (1948), suggests to us that such an environment may not be maintained at public expense. • • •

We are aware, of course, that *Dicenso* dealt with elementary and secondary schools rather than colleges but we believe that what we have quoted applies as well to many church colleges. As Pattillo and Mackenzie state in their study of church related colleges (at p. 127): "It hardly need be said that the distinction between religion and other aspects of an institution's educational program is artificial. Religion, properly understood, is a pervasive element."

The statute challenged here does not require that the facility financed with Federal funds be situated off the campus, or even in a separate building, and the Department of Health, Education and Welfare construes it to allow financing of a laboratory or a library situated in a building otherwise devoted to sectarian instruction, so long as there is some visible partition between them. It is, we submit, unrealistic even at the college level to create an island of secularity surrounded by a sea of sectarianism.

The catalogue of Wheaton College, Illinois (quoted in Pattillo and Mackenzie at p. 19) reads:

> The central purpose of Wheaton College is expressed in the motto engraved on the cornerstone of the main building: For *Christ and His Kingdom.* Since the foundation of the institution, this purpose has produced an enthusiastic concern for truth, righteousness and beauty, and has thereby given meaning to the ideal of a Christian liberal arts college that seeks

> to understand human culture from a Biblical and theistic viewpoint, and to encourage responsible Christian participation in contemporary society.

Perhaps this does not mean what it says, or perhaps this particular institution does not deliver what it promises. But can it be said that there are no significant number of sectarian colleges in the United States who do in fact mean what they say and deliver what they promise? Can it be realistically held that a governmental grant of funds to erect a laboratory or classroom extension in such an institution does not have the effect of advancing religion? We do not think so.

C. *The* Walz *Test: Entanglement*

In the *Walz* case, the latest examination into the meaning of the Establishment Clause by this Court, it was held that if the purpose of a law is to advance or support religion it is unconstitutional. We have sought to establish that insofar as sectarian educational institutions are concerned, the purpose of the statute is in fact to advance and support religion.

But even if that is not its purpose, the law is still unconstitutional if its end result or effect is "an excessive government entanglement with religion" (90 S. Ct. at 1414). Tax exemption for churches was upheld because it involved less entanglement than would the removal of exemption. But exemption, the Court held, was constitutionally different from subsidy because the latter does involve entanglement. The Court said (at 1414):

> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also

gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. The hazards of churches supporting government are hardly less in their potential than the hazards of governments supporting churches; each relationship carries some involvement rather than the desired insulation and separation. We cannot ignore the instances in history when church support of government led to the kind of involvement we seek to avoid.

In none of the school cases considered by this Court was the challenged statute upheld where the record showed state involvement in church affairs or church involvement in state affairs. In *Everson* the children were brought to the parochial schools on public buses, but no public official entered the school. In *Zorach*, the state did no more than release the children before the regular dismissal time; it in no way sought to control or supervise the instruction within the church school. In *Allen* all the statute contemplated that the state should do was to provide children attending parochial schools with textbooks which had independently been selected by public authorities for use in public schools.[10] In *McCollum*, on the other hand, church

[10] Whether in practice this is what happened may be questionable. See Note, *Sectarian Books, the Supreme Court and the Establishment Clause*, 79 Yale L.J. 111 (1969).

teachers entered the public school premises and with the cooperation of the school authorities conducted their religious instruction.

The provision in the present statute forbidding use of the Federally financed facility for religious worship or sectarian instruction was placed there because otherwise it would be unconstitutional under the principles of *McCollum*, *Engel* and *Schempp*. But in seeking to avoid the Scylla of sectarianism the statutory plan is necessarily engulfed in the Charybdis of entanglement. There is simply no way of avoiding the former danger but by "sustained[11] and detailed administrative relationships" or, to put it in other words, by continued surveillance and policing.

Such policing will not be easy. In *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) the Court held unconstitutional under the Establishment Clause a statute which forbade the teaching of evolution in public schools and in colleges and universities supported in whole or in part by public funds. Applied to the present case, this means that Federal officials must make sure not only that the biology instructor in a classroom financed with funds under the Act refrain from teaching creation according to Genesis but that he affirmatively teach creation according to Darwin.

Even if the term "sectarian instruction" is construed more narrowly to encompass only affirmative teaching, the task of the Federal inspector will be a formidable one. True enough unlike the classic inquisitor the censor will

[11] The surveillance must be sustained for 20 years. Section 404 of the statute (20 U.S.C. 754(b)) provides that if at any time within that period the facility is used for religious worship or sectarian instruction, restitution must be made to the Government.

be seeking to eradicate orthodoxy rather than heresy, but the Establishment Clause forbids the inhibition of religion no less than its advancement. In any event, it is just this type of state involvement in church affairs which both the Establishment and Free Exercise Clauses of the First Amendment forbid. *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952); *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969).

It is no answer that the same "sustained and detailed administrative relationships" are required in respect to concededly nonreligious colleges receiving Federal funds lest evangelistic teachers bootleg sectarianism into their biology or astronomy lectures. The critical difference lies in the fact that the First Amendment does not forbid "sustained and detailed administrative relationships" between a secular government and a secular school system, but it does forbid them between a secular government and a religious school system.

Again we think it apposite to quote from Judge Coffin's opinion in *Dicenso* (and as to what follows, the court was unanimous):

> When the effect of the Salary Supplement Act is judged by this standard, two significant dangers appear. First, the Act authorizes a subsidy which, unlike the exemptions involved in *Walz,* must be annually renewed. In a nation of many sects, the efforts to obtain government financing of those few denominations which support school systems will inevitably excite bitter controversy. In some jurisdictions where the majority belong to a single denomination, state

subsidies of sectarian schools may amount to an establishment in the classic sense. In Rhode Island itself, sectarian controversy is likely to be exacerbated by the continuing financial crisis in its parochial schools, and by the open-ended nature of the Act. If this grant is constitutional, we would find it difficult to distinguish a 50 or 100 per cent subsidy of teachers' salaries, or a percentage subsidy of the total cost of "secular" education such as Rhode Island already provides its public schools.

On the other side of the coin, significant state subsidies will inevitably produce significant state limitations on the freedom of denominational schools. A direct subsidy of the educational process such as this statute provides requires greater administrative involvement between church and state than the payment of transportation costs involved in *Everson* or the loaning of textbooks in *Allen*. In *Everson*, the local school committee simply reimbursed the parents of parochial school children for bus fares. In *Allen* public school officials—in theory, at least—performed their customary task of determining which books were suitable for public school use. *Compare* R. I. Gen. Laws §16-1-9 (Supp. 1967). Under this statute, by contrast, the Commissioner of Education must monitor parochial school expenditures and in close cases determine which spending is "religious" and which "secular". This ongoing administrative relationship between government and the Catholic schools creates the possibility of legal disputes over the "secular-religious" distinction, *cf. Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hill*

Memorial Presbyterian Church, 393 U.S. 440 (1969), and may well influence the allocation of church resources as the parishes tailor their spending to meet the Commissioner's criteria.

Equally important, the kind of involvement which this statute promotes may significantly limit the internal freedom of parochial schools. Already the Act has restricted the role of teachers. The evidence before us indicates that some otherwise qualified teachers have stopped teaching courses in religion in order to qualify for aid under the Act. One teacher, in fact, testified that he no longer prays with his class lest he endanger his subsidy. Similar restrictions may be expected on the content of courses. In this very case we have been forced to inquire into the teaching in Rhode Island's Catholic schools in order to determine whether religion "permeates" the teaching of secular subjects. *See also Board of Education* v. *Allen*, 392 U.S. at 248. Surely such inquiries represent a substantial limitation on the freedom of parochial schools to set their own curriculum. Moreover, as Judge Hastie pointed out dissenting in *Lemon* v. *Kurtzman*, 310 F. Supp. at 52, private conduct which is heavily subsidized by the state may be viewed as state action and subjected to the same standards of impartiality which we demand of the government. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *cf. Evans* v. *Newton*, 382 U.S. 296 (1966).

Applying these standards to parochial schools might well restrict their ability to discriminate in admissions policies, *cf. Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957), and in the hir-

ing and firing of teachers, *cf. Keefe* v. *Geanakos*, 418 F.2d 359 (1st Cir. 1969). At some point the school becomes "public" for more purposes than the Church could wish. At that point, the Church may justifiably feel that its victory on the Establishment Clause has meant abandonment of the Free Exercise Clause.

In short, we see as the necessary effects of the kind of legislation involved here not only substantial support for a religious enterprise, but also the kind of reciprocal embroilments of government and religion which the First Amendment was meant to avoid. We therefore hold that the Salary Supplement Act results in excessive government entanglement with religion and thus violates the Establishment Clause of the First Amendment. *Accord, Opinion of the Justices*, 261 A.2d 58 (Me. Jan. 15, 1970).

D. *Religion as a Means to a Secular End*

In his concurring opinion in *Schempp*, Mr. Justice Brenan said (374 U.S. at 265):

> • • • the teaching of both Torcaso and the Sunday Law Cases is that government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice.

It was on this principle that he based his concurrence in *Walz*, and it is a principle which we believe is fully consistent with the history and purpose of the Establishment Clause.

One of the arguments stated by Madison in his *Memorial and Remonstrance* in opposition to taxation for

religious purposes, was that government's employment of "Religion as an engine of Civil policy . . . [is] an unhallowed perversion of the means of salvation." [12] The great statesman and jurist, Jeremiah S. Black, stated that the fathers of our Constitution "built up a wall of complete and perfect partition" between church and state in order that "one should never be used as an engine for the purpose of the other." [13]

To hold that government may as a matter of convenience rather than overriding necessity employ religion as a means to effect secular ends which are properly within governmental competence would go far toward making the First Amendment meaningless. Practically every defense of religious instruction in public schools is predicated on the not unreasonable assertion that religious education leads to morality and good citizenship. If religion could be used to achieve the obviously secular goals of morality and good citizenship, it would follow not only that religion could constitutionally be taught in the public schools, but also that tax-raised funds could be used to finance religion and religious education. (The preamble of the Virginia Assessment Bill which led to the *Remonstrance* stated that its purpose was "to correct the morals of men, restrain their vices, and preserve the peace of society.") Moreover, the government could reasonably find that some religions, such as Protestantism, Catholicism, and Judaism, are more likely to inculcate good citizenship than others (Jehovah's Witnesses or the Black Muslims for example) and, therefore, could aid the former and not the latter, a conclusion we doubt any court would accept today.

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[12] *Everson*, Appendix, 330 U.S. at 67.

[13] Black, J. S., *Essays and Speeches*, p. 53 (1885).

Measured by the standard that religion may not be used to serve secular interests in the absence of convincing proof of overriding necessity, the statute challenged here cannot be constitutionally applied to include sectarian colleges. Even assuming that the purpose of Congress was only to finance secular instruction for additional students, there is not the slightest evidence that this could not be accomplished (as it is and always has been in the states) by supporting public and private nonsectarian educational institutions. (Paragraph 26 of the complaint herein [A. 13] so alleges.)

E. *The Test of Time and Space*

In *Walz* both the Court's opinion by the Chief Justice (90 S. Ct. at 1415) and the concurring opinion of Mr. Justice Brennan (at 1418) stressed that tax exemption for churches went back to the earliest days of the Republic; both quoted the comment of Mr. Justice Holmes in *New York Trust Co.* v. *Eisner,* 256 U.S. 345, 349 (1921) that "a page of history is worth a volume of logic." Both stressed the fact that tax exemption for churches is a universal practice in effect in every one of the states. The antiquity and ubiquity of tax exemption is strong if not conclusive evidence of its constitutionality.

In the present case, however, history and practice point in exactly the opposite direction. From the disestablishment of churches at the end of the 18th and the beginning of the 19th centuries until the enactment of the statute challenged herein neither the Federal government nor any state has directly subsidized construction or operations of sectarian educational instructions. Just as the constitution or laws of every state in the Union authorize tax exemption

so do they universally forbid direct subsidization. See Note, *Catholic Schools and Public Money*, 50 Yale L.J. 917 (1941); *Horace Mann League* v. *Board of Public Works*, *supra*.

Other than the present case and the case of *Lemon* v. *Kautzman*, now before this Court, we know of no case in a court in the United States, Federal or state, in which a law providing for payment of taxraised funds to a church to subsidize its sectarian school operations or construction has been upheld as constitutional.[14] There have been a number of cases wherein parochial schools experiencing financial difficulties were purportedly transferred to the public school system under a plan whereby the parochial school premises were rented to the public school authorities and the teachers, usually nuns and sisters, were employed *en masse* by them as public school teachers. With but one exception,[15] the arrangement was held unconstitutional in every case[16] and even in the exceptional case constitutionality was based on a factual finding that the school was no longer a parochial school but had in fact become incorporated into the public school system even though the nuns turned over their public school salary checks to the religious order to which they belonged.

We conclude our consideration of the Establishment Clause with the suggestion that whether it forbids laws which provide for the subsidization of sectarian educational

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[14] The most recent decision holding such a law to be unconstitutional is *State ex rel. Chambers* v. *School District No. 10*, —— Mont. ——, decided July 28, 1970. See also, *Americans United* v. *Ind. School District No. 622*, —— Minn. ——, decided August 7, 1970 (*dictum*).

[15] *State ex rel. Johnson* v. *Boyd*, 217 Ind. 348 (1940).

[16] The cases cited and discussed in Note, *Catholic Schools and Public Money*, 50 Yale L.J. 917 (1941).

institutions, or laws whose purpose or effect is to advance religion, or which result in governmental entanglement with religion, or utilize religion to further a secular purpose in absence of convincing proof of overriding necessity or are contrary to the historic and universal interpretation of that Clause, the statute challenged here must be held an unconstitutional establishment of religion to the extent that it encompasses sectarian educational institutions as we have defined that term.

IV.

The Free Exercise of Religion.

The present suit is based not only on the Establishment but also on the Free Exercise Clause of the First Amendment. The complaint sets forth a separate and independent count asserting that the use of Federal funds to finance sectarian educational institutions constitutes compulsory taxation for religion and is therefore a violation of the plaintiffs' free exercise of religion. Fundamental to the concept of religious freedom, as envisaged by the Framers, was the belief that it was destructive of personal freedom to compel any man to pay taxes for the support of religion. Indeed, the history of the struggle for religious freedom in America is in large measure the history of the struggle against taxation for religious purposes.[17] It was the effort

[17] As the Court said in the *Everson* case, 330 U.S. at 11:

> These practices became so commonplace as to shock the freedom-loving colonilas into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. • • •

to enact just such a statute for financing religious schools in Virginia that gave rise to that state's adoption of Jefferson's Bill for the Establishment of Religious Freedom which was the basis of both the Establishment and Free Exercise provisions of the First Amendment.

We believe that the logic of *Flast* v. *Cohen, supra,* requires a determination that use of tax-raised funds for religious purposes constitutes in historic and constitutional perspective a tax for religious purposes imposed upon every taxpayer. The fact that the taxes paid by the plaintiffs or other taxpayers are not specifically earmarked for the effectuation of the purposes of the statute in issue is as immaterial to a challenge under the Free Exercise Clause as under the Establishment Clause, for if there is a sufficient nexus to justify a claim under the one there must also be one under the other. Similarly, the fact that the amount of the taxpayer's payment allocated to the religious purpose is minute, is as immaterial in the one case as in the other. *Cf. Baker* v. *Carr,* 369 U.S. 186 (1962).

The crux of the matter is that when government uses tax-raised funds to support religion it is taxing citizens for a religious purpose, and is thus a violation of the Free Exercise Clause. That clause, no less than the Establishment Clause, is directly related in its origin to the struggle against the Virginia Assessment Bill, and that bill, as the present one, had as its purpose the subsidization of religious groups engaged in the propagation of their particular religions.

CONCLUSION

For the reasons set forth herein, the decision of the court below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Excerpts from Public Law 88-204, 77 Stat. 363-70 and 374, as Amended (20 U.S.C. § 701 et seq.)

CHAPTER 21.—HIGHER EDUCATION FACILITIES [NEW]

§ 701. Congressional findings and declaration of policy

The Congress hereby finds that the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education. The Congress further finds and declares that these needs are so great and these steps so urgent that it is incumbent upon the Nation to take positive and immediate action to meet these needs through assistance to institutions of higher education, including graduate and undergraduate institutions, junior and community colleges, and technical institutes, in providing certain academic facilities.

SUBCHAPTER I.—GRANTS FOR CONSTRUCTION OF UNDERGRADUATE ACADEMIC FACILITIES

§ 711. Authorization of appropriations

(a) The Commissioner of Education (hereinafter in this chapter referred to as the "Commissioner") shall carry out during the fiscal year ending June 30, 1964, and each of the seven succeeding fiscal years, a program of grants to insti-

tutions of higher education for the construction of academic facilities in accordance with this subchapter.

(b) For the purpose of making grants under this subchapter, there is hereby authorized to be appropriated the sum of $230,000,000 for the fiscal year ending June 30, 1964, and for the succeeding fiscal year, $460,000,000 for the fiscal year ending June 30, 1966, $475,000,000 for the fiscal year ending June 30, 1967, $728,000,000 for the fiscal year ending June 30, 1968, and $936,000,000 for the fiscal year ending June 30, 1969; but for the fiscal year ending June 30, 1970, and the succeeding fiscal year, only such sums may be appropriated as Congress may hereafter authorize by law. In addition to the sums authorized to be appropriated for each fiscal year for which an appropriation is authorized by the preceding sentence, there is hereby authorized to be appropriated for that fiscal year for making such grants the difference (if any) between any specific sums authorized to be appropriated under the preceding sentence for the preceding fiscal year and the sums which were appropriated for such preceding year under such sentence.

(c) Sums appropriated pursuant to subsection (b) of this section shall remain available for reservation as provided in section 719 of this title until the close of the fiscal year next succeeding the fiscal year for which they were appropriated.

§ 712. Allotment of funds

The following percentage of the funds appropriated pursuant to section 711 of this title for a fiscal year shall be allotted among the States in the manner prescribed by section 713 of this title for use in providing academic facilities for public community colleges and public technical institutes:

(1) In the case of fiscal years ending before July 1, 1967, 22 per centum.

(2) In the case of the fiscal year ending June 30, 1968, 23 per centum.

(3) In the case of fiscal years ending after June 30, 1968, 24 per centum.

The remainder of the funds so appropriated for any fiscal year shall be allotted among the States in the manner as prescribed in section 714 of this title for use in providing academic facilities for institutions of higher education other than public community colleges and public technical institutes.

§ 713. Allotments for public community colleges and technical institutes—Basis of computation

(a) The funds to be allotted for any fiscal year for use in providing academic facilities for public community colleges and public technical institutes shall be allotted among the States on the basis of the income per person and the number of high school graduates of the respective States. Such allotments shall be made as follows: The Commissioner shall allot to each State for each fiscal year an amount which bears the same ratio to the funds being allotted as the product of—

(1) the number of high school graduates of the State, and

(2) the State's allotment ratio (as determined under subsection (d) of this section)

bears to the sum of the corresponding products for all the States.

Availability of funds

(b) (1) The amount of each allotment to a State under this section shall be available, in accordance with the provisions of this subchapter, for payment of the Federal share (as determined under sections 718(b) (3) and 751(d) of this title) of the development cost of approved projects for the construction of academic facilities within such State for public community colleges and public technical institutes. Sums allotted to a State for the fiscal year ending June 30, 1964, shall remain available for reservation as provided in section 719 of this title until the close of the next fiscal year, in addition to the sums allotted to such State for such next fiscal year.

(2) Notwithstanding any other provisions of this subchapter, any portion of a State's allotment under this section for a fiscal year for which applications from an institution qualified to receive grants under this section have not been received by the State Commission by January 1 of such fiscal year, shall, if the Commission so requests, be available, in accordance with the provisions of this subchapter, for payment of the Federal share (as determined under sections 718(b) (3) and 751(d) of this title) of the development cost of approved projects for the construction of academic facilities within such State for institutions of higher education other than public community colleges and public technical institutes.

Reallotment of unreserved funds at close of fiscal year; factors considered

(c) All amounts allotted under this section for any fiscal year which are not reserved as provided in section 719 of this title by the close of the fiscal year for which they are allotted, shall be reallotted by the Commissioner, on the

basis of such factors as he determines to be equitable and reasonable, among the States which, as determined by the Commissioner, are able to use without delay any amounts so reallotted for the purposes set forth in subsection (b) of this section. Amounts reallotted under this subsection shall be available for reservation until the close of the fiscal year next succeeding the fiscal year for which they were originally allotted.

Allotment ratio, specification and promulgation of; high school graduate defined

(d) For purposes of this section—

(1) The "allotment ratio" for any State shall be 1.00 less the product of (A) .50 and (B) the quotient obtained by dividing the income per person for the State by the income per person for all the States (not including Puerto Rico, the Virgin Islands, American Samoa, and Guam), except that (i) the allotment ratio shall in no case be less than .33⅓ or more than .66⅔, (ii) the allotment ratio for Puerto Rico, the Virgin Islands, American Samoa, and Guam shall be .66⅔, and (iii) the allotment ratio of any State shall be .50 for any fiscal year if the Commissioner finds that the cost of school construction in such State exceeds twice the median of such costs in all the States as determined by him on the basis of an index of the average per pupil cost of constructing minimum school facilities in the States as determined for such fiscal year under section 645(6) of this title, or, in the Commissioner's discretion, on the basis of such index and such other statistics and data as the Commissioner shall deem adequate and appropriate; and

(2) The allotment ratios shall be promulgated by the Commissioner as soon as possible after December 16, 1963, and annually thereafter, on the basis of the average of the incomes per person of the States and of all the States for the three most recent consecutive calendar years for which satisfactory data are available from the Department of Commerce.

(3) The term "high school graduate" means a person who has received formal recognition (by diploma, certificate, or similar means) from an approved school for successful completion of four years of education beyond the first eight years of schoolwork, or for demonstration of equivalent achievement. For the purposes of this section the number of high school graduates shall be limited to the number who graduated in the most recent school year for which satisfactory data are available from the Department of Health, Education and Welfare. The interpretation of the definition of "high school graduate" shall fall within the authority of the Commissioner.

§ 714. Allotments for institutions of higher education other than public community colleges and technical institutes—Considerations and determinations affecting

(a) Of the funds to be allotted for any fiscal year for use in providing academic facilities for institutions of higher education other than public community colleges and public technical institutes (1) one-half shall be allotted by the Commissioner among the States so that the allotment to each State under this clause will be an amount which bears the same ratio to such one-half as the number of students enrolled in institutions of higher education in such State bears to the total number of students enrolled in such insti-

tutions in all the States; and (2) the remaining one-half shall be allotted by him among the States so that the allotment to each State under this clause will be an amount which bears the same ratio to such remainder as the number of students enrolled in grades nine to twelve (both inclusive) of schools in such State bears to the total number of students in such grades in schools in all the States. For the purposes of this subsection, (A) the number of students enrolled in institutions of higher education shall be deemed to be equal to the sum of (i) the number of full-time students and (ii) the full-time equivalent of the number of part-time students as determined by the Commissioner in accordance with regulations; and (B) determinations as to enrollment under either clause (1) or clause (2) of this subsection shall be made by the Commissioner on the basis of data for the most recent year for which satisfactory data with respect to such enrollment are available to him.

Availability of funds

(b) (1) The amount of each allotment to a State under this section shall be available, in accordance with the provisions of this subchapter, for payment of the Federal share (as determined under sections 718(b) (3) and 751(d) of this title) of the development cost of approved projects for the construction of academic facilities within such State for institutions of higher education other than public community colleges and public technical institutes. Sums allotted to a State for the fiscal year ending June 30, 1964, shall remain available for reservation as provided in section 719 of this title until the close of the next fiscal year, in addition to the sums allotted to such State for such next fiscal year.

(2) Notwithstanding any other provisions of this subchapter, any portion of a State's allotment under this section for a fiscal year for which applications from an institution qualified to receive grants under this section have not been received by the State Commission by January 1 of such fiscal year, shall, if the Commission so requests, be available, in accordance with the provisions of this subchapter, for payment of the Federal share (as determined under sections 718(b) (3) and 751(d) of this title) of the development cost of approved projects for the construction of academic facilities within such State for public community colleges and public technical institutes.

Reallotment of unreserved funds at close of fiscal year; factors considered

(c) All amounts allotted under this section for any fiscal year which are not reserved as provided in section 719 of this title by the close of the fiscal year for which they are allotted, shall be reallotted by the Commissioner on the basis of such factors as he determines to be equitable and reasonable, among the States which, as determined by the Commissioner, are able to use without delay any amounts so reallotted for the purposes set forth in subsection (b) of this section. Amounts reallotted under this subsection shall be available for reservation until the close of the fiscal year next succeeding the fiscal year for which they were originally allotted.

§ 715. State commissions and plans; authorized expenditures

(a) Any State desiring to participate in the grant program under this subchapter shall designate for that purpose an existing State agency which is broadly representative of the public and of institutions of higher education

(including junior colleges and technical institutes) in the State, or, if no such State agency exists, shall establish such a State agency, and submit to the Commissioner through the agency so designated or established (in this subchapter referred to as the "State commission"), a State plan for such participation. The Commissioner shall approve any such plan which—

(1) provides that it shall be administered by the State commission;

(2) sets forth, consistently with basic criteria prescribed by regulation pursuant to section 717 of this title, objective standards and methods (A) for determining the relative priorities of eligible projects for the construction of academic facilities submitted by institutions of higher education within the State, and (B) for determining the Federal share of the development cost of each such project (unless such plan provides for a uniform Federal share for all such projects);

(3) provides that the funds allotted (or reallotted) for any year under section 713 of this title will be available (except as provided in section 713(b) (2) of this title) only for use for the construction of academic facilities for public community colleges and public technical institutes, and that funds allotted (or reallotted) for any year to the State under section 714 of this title will be available (except as provided in section 714(b) (2) of this title) only for use for the construction of academic facilities for institutions of higher education other than public community colleges and public technical institutes;

(4) provides (A) for assigning priorities solely on the basis of such criteria, standards, and methods to

eligible projects submitted to the State commission and deemed by it to be otherwise approvable under the provisions of this subchapter; and (B) for approving and recommending to the Commissioner, in the order of such priority, applications covering such eligible projects, and for certifying to the Commissioner the Federal share, determined by the State commission under the State plan, of the development cost of the project involved;

(5) provides for affording to every applicant, which has submitted to the State commission a project, an opportunity for a fair hearing before the State commission as to the priority assigned to such project or as to any other determination of the State commission adversely affecting such applicant; and

(6) provides (A) for such fiscal control and fund accounting procedures as may be necessary to assure proper disbursement of and accounting for Federal funds paid to the State commission under this subchapter, and (B) for the making of such reports, in such form and containing such information, as may be reasonably necessary to enable the Commissioner to perform his functions under this subchapter.

(b) The Commissioner is authorized to expend not exceeding $3,000,000 during the fiscal years ending June 30, 1965, and June 30, 1966, and not exceeding $7,000,000 for the fiscal year ending June 30, 1967, and each of the two succeeding fiscal years, in such amounts as he may consider necessary (1) for the proper and efficient administration of the State plans approved under this subchapter, and sections 1121–1129 of this title, including expenses

which he determines were necessary for the preparation of such plans, and (2) for grants, upon such terms and conditions as the Commissioner determines will best further the purposes of this chapter, to State commissions for conducting, either directly or through other appropriate agencies and institutions, comprehensive planning to determine the construction needs of institutions (and particularly combinations and regional groupings of institutions) of higher education. Not more than $3,000,000 may be expended in any fiscal year for the purposes set forth in clause (1). For the fiscal year ending June 30, 1970, and the succeeding fiscal year, the Commissioner may expend for purposes of this subsection only such sums as Congress may hereafter authorize by law.

§ 716. Eligibility of institutions for grants

An institution of higher education shall be eligible for a grant for construction of an academic facility under this subchapter only if such construction will, either alone or together with other construction to be undertaken within a reasonable time, (1) result in an urgently needed substantial expansion of the institution's student enrollment capacity or capacity to carry out extension and continuing education programs on the campus of such institution, or (2) in the case of a new institution of higher education, result in creating urgently needed enrollment capacity or capacity to carry out extension and continuing education programs on the campus of such institution.

§ 717. Basic criteria for determining priorities and Federal share

(a) As soon as practicable after December 16, 1963 the Commissioner shall by regulation prescribe basic criteria

to which the provisions of State plans setting forth standards and methods for determining relative priorities of eligible construction projects, and the application of such standards and methods to such projects under such plans, shall be subject. Such basic criteria (1) shall be such as will best tend to achieve the objectives of this subchapter while leaving opportunity and flexibility for the development of State plan standards and methods that will best accommodate the varied needs of institutions in the several States, and (2) shall give special consideration to expansion of undergraduate enrollment capacity. Subject to the foregoing requirements, such regulations may establish additional and appropriate basic criteria, including provision for considering the degree to which applicant institutions are effectively utilizing existing facilities, provision for allowing State plans to group or provide for grouping, in a reasonable manner, facilities or institutions according to functional or educational type for priority purposes, and, in view of the national objectives of this chapter, provision for considering the degree to which the institution serves students from two or more States or from outside the United States; and in no event shall an institution's readiness to admit such out-of-State students be considered as a priority factor adverse to such institution.

(b) The Commissioner shall further prescribe by regulation the basic criteria for determining the Federal share of the development cost of any eligible project under this subchapter within a State, to which criteria the applicable standards and methods set forth in the State plan for such State shall conform in the absence of a uniform statewide Federal share specified in or pursuant to such plan. In the case of a project for an institution of higher education other than a public community college or public technical

institute, the Federal share shall in no event exceed 33⅓ per centum of its development cost; and in the case of a project for a public community college or public technical institute, the Federal share shall in no event exceed 40 per centum of its development cost.

(c) Section 1003 of Title 5 shall apply to the prescription of regulations under this section, notwithstanding the provisions of clause (2) thereof.

§ 718. Applications for grants—Submission of applications by institutions

(a) Institutions of higher education which desire to obtain grants under this subchapter shall submit applications therefor at such time or times and in such manner as may be prescribed by the Commissioner, and such applications shall contain such information as may be required by or pursuant to regulation for the purpose of enabling the Commissioner to make the determinations required to be made by him under this subchapter.

Conditions for approval

(b) The Commissioner shall approve an application covering a project for construction of an academic facility and meeting the requirements prescribed pursuant to subsection (a) of this section if—

(1) the project is an eligible project as determined under section 716 of this title;

(2) the project has been approved and recommended by the appropriate State commission;

(3) the State commission has certified to the Commissioner, in accordance with the State plan, the Fed-

eral share of the development cost of the project, and sufficient funds to pay such Federal share are available from the applicable allotment of the State (including any applicable reallotment to the State);

(4) the project has, pursuant to the State plan, been assigned a priority that is higher than that of all other projects within such State (chargeable to the same allotment) which meet all the requirements of this section (other than this clause) and for which Federal funds have not yet been reserved;

(5) the Commissioner determines that the construction will be undertaken in an economical manner and will not be of elaborate or extravagant design or materials; and

(6) the Commissioner determines that (in addition to the assurance required by section 753 of this title and such assurance as to title to the site as he may deem necessary) the application contains or is supported by satisfactory assurances—

(A) that Federal funds received by the applicant will be used solely for defraying the development cost of the project covered by such application,

(B) that sufficient funds will be available to meet the non-Federal portion of such cost and to provide for the effective use of the academic facility upon completion, and

(C) that the facility will be used as an academic facility during at least the period of the Federal interest therein (as defined in section 754 of this title).

Amendments of applications

(c) Amendments of applications shall, except as the Commissioner may otherwise provide by or pursuant to regulation, be subject to approval in the same manner as original applications.

§ 719. Reservation and payment of grant

Upon his approval of any application for a grant under this subchapter, the Commissioner shall reserve from the applicable allotment (including any applicable reallotment) available therefor, the amount of such grant, which (subject to the limits of such allotment or reallotment) shall be equal to the Federal share (ascertained by him under section 718(b) (3) of this title) of the development cost of the project covered by such application. The Commissioner shall pay such reserved amount, in advance or by way of reimbursement, and in such installments consistent with construction progress, as he may determine. The Commissioner's reservation of any amount under this section may be amended by him, either upon approval of an amendment of the application covering such project or upon revision of the estimated development cost of a project with respect to which such reservation was made, and in the event of an upward revision of such estimated cost approved by him he may reserve the Federal share of the added cost only from the applicable allotment (or reallotment) available at the time of such approval.

§ 720. Disapproval of State plans; notice and hearing; findings of Commissioner; notification of non-eligibility

(a) The Commissioner shall not finally disapprove any State plan submitted under this subchapter, or any modifi-

cation thereof, without first affording the State commission submitting the plan reasonable notice and opportunity for a hearing.

(b) Whenever the Commissioner, after reasonable notice and opportunity for hearing to the State commission administering a State plan approved under this subchapter, finds—

(1) that the State plan has been so changed that it no longer complies with the provisions of section 715(a) of this title, or

(2) that in the administration of the plan there is a failure to comply substantially with any such provision,

the Commissioner shall notify such State commission that the State will not be regarded as eligible to participate in the program under this subchapter until he is satisfied that there is no longer any such failure to comply.

§ 721. Judicial review—Appeal by State of Commissioner's final action to court of appeals

(a) If any State is dissatisfied with the Commissioner's final action with respect to the approval of its State plan submitted under section 715(a) of this title or with his final action under section 720(b) of this title, such State may appeal to the United States court of appeals for the circuit in which such State is located. The summons and notice of appeal may be served at any place in the United States. The Commissioner shall forthwith certify and file in the court the transcript of the proceedings and the record on which he based his action.

Findings of Commissioner conclusive if substantially supported; remand for taking further evidence; new or modified findings conclusive if supported

(b) The findings of fact by the Commissioner, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the transcript and record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

Jurisdiction of court of appeals; review by Supreme Court

(c) The court shall have jurisdiction to affirm the action of the Commissioner or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

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SUBCHAPTER IV.—GENERAL PROVISIONS

§ 751. Definitions

As used in this chapter—

(a) (1) Except as provided in subparagraph (2) of this paragraph, the term "academic facilities" means structures suitable for use as classrooms, laboratories, libraries, and related facilities necessary or appropriate for instruction of students, or for research, or for administration[1] of the

educational or research programs, of an institution of higher education, and maintenance, storage, or utility facilities essential to operation of the foregoing facilities. Plans for such facilities shall be in compliance with such standards as the Secretary of Health, Education, and Welfare may prescribe or approve in order to insure that facilities constructed with the use of Federal funds under this chapter shall be, to the extent appropriate in view of the uses to be made of the facilities, accessible to and usable by handicapped persons.

(2) The term "academic facilities" shall not include (A) any facility intended primarily for events for which admission is to be charged to the general public, or (B) any gymnasium or other facility specially designed for athletic or recreational activities, other than for an academic course in physical education or where the Commissioner finds that the physical integration of such facilities with other academic facilities included under this chapter is required to carry out the objectives of this chapter, or (C) any facility used or to be used for sectarian instruction or as a place for religious worship, or (D) any facility which (although not a facility described in the preceding clause) is used or to be used primarily in connection with any part of the program of a school or department of divinity, or (E) any facility used or to be used by a school of medicine, school of dentistry, school of osteopathy, school of pharmacy, school of optometry, school of podiatry, or school of public health, as these terms are defined in section 293d of Title 42, or a school of nursing as defined in section 298b of Title 42. For the purposes of this subparagraph, the term "school or department of divinity" means an institu-

tion, or a department or branch of an institution, whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation or to prepare them to teach theological subjects.

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 153

ELEANOR TAFT TILTON, ET AL,

Appellants,

v.

ELLIOTT L. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare; JAMES E. ALLEN, JR., Commissioner of Education of the United States; MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut; SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY, ALBERTUS MAGNUS COLLEGE,

Appellees.

ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLEE
MARVIN K. PETERSON,
Chairman of the Commission on Aid to Higher Education of the State of Connecticut

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LEDGE PRESS, PRINTERS, HARTFORD

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Chairman of the Commission on Aid to Higher Education of the State of Connecticut

OPINION BELOW

The opinion of the United States District Court for Connecticut is reported in 312 F. Supp. 1191 (1970) (Record Appendix, pp. 37-67).

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JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1253. *Flast* v. *Cohen*, 392 U.S. 83 (1968).

QUESTIONS PRESENTED

1. Whether Title I of the Higher Education Facilities Act of 1963 authorizes grants to defendant church related colleges and universities for construction of academic facilities?

2. If so, whether the Act and grants thereunder impair the plaintiffs' rights under the establishment clause or the free exercise clause of the First Amendment of the Constitution of the United States?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides inter alia:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; . . ."

The sections of the Higher Education Facilities Act of 1963, 20 U.S.C. § 701-758 (1964), set forth below are considered to be material to this Court's consideration of the constitutional issue:

Sec. 701. Congressional findings and declaration of policy.

The Congress hereby finds that the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that

this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education. The Congress further finds and declares that these needs are so great and these steps so urgent that it is incumbent upon the Nation to take positive and immediate action to meet these needs through assistance to institutions of higher education, including graduate and undergraduate institutions, junior and community colleges, and technical institutes, in providing certain academic facilities. (20 U.S.C. § 701).

Sec. 716. Eligibility of institutions for grants.

An institution of higher education shall be eligible for a grant for construction of an academic facility under this subchapter only if such construction will, either alone or together with other construction to be undertaken within a reasonable time, (1) result in an urgently needed substantial expansion of the institution's student enrollment capacity or capacity to carry out extension and continuing education programs on the campus of such institution, or (2) in the case of a new institution of higher education, result in creating urgently needed enrollment capacity or capacity to carry out extension and continuing education programs on the campus of such institution. (20 U.S.C. § 716).

Sec. 717. Basic criteria for determining priorities and Federal share.

(a) As soon as practicable after December 16, 1963 the Commissioner shall by regulation prescribe basic criteria to which the provisions of State plans setting forth standards and methods for determining relative priorities of eligible construction project, and the application of such standards and methods to such projects under such plans, shall be

subject. Such basic criteria (1) shall be such as will best tend to achieve the objectives of this subchapter while leaving opportunity and flexibility for the development of State plan standards and methods that will best accommodate the varied needs of institutions in the several States, and (2) shall give special consideration to expansion of undergraduate enrollment capacity. Subject to the foregoing requirements, such regulations may establish additional and appropriate basic criteria, including provision for considering the degree to which applicant institutions are effectively utilizing existing facilities, provision for allowing State plans to group or provide for grouping, in a reasonable manner, facilities or institutions according to functioning or educational type for priority purposes, and, in view of the national objectives of this chapter, provision for considering the degree to which the institution serves students from two or more States or from outside the United States; and in no event shall an institution's readiness to admit such out-of-State students be considered as a priority factor adverse to such institution. [20 U.S.C. 717(a)].

Sec. 718. Applications for grants — Submission of applications by institutions.

(a) Institutions of higher education which desire to obtain grants under this subchapter shall submit applications therefor at such time or times and in such manner as may be prescribed by the Commissioner, and such applications shall contain such information as may be required by or pursuant to regulations for the purpose of enabling the Commissioner to make the determinations required to be made by him under this subchapter.

Conditions for approval.

(b) The Commissioner shall approve an application covering a project for construction of an academic facility and

meeting the requirements prescribed pursuant to subsection (a) of this section if—

(1) the project is an eligible project as determined under section 716 of this title;

(2) the project has been approved and recommended by the appropriate State commission;

(3) the State commission has certified to the Commissioner, in accordance with the State plan, the Federal share of the development cost of the project, and sufficient funds to pay such Federal share are available from the applicable allotment of the State (including any applicable reallotment to the State);

(4) the project has, pursuant to the State plan, been assigned priority that is higher than that of all other projects within such State (chargeable to the same allotment) which meet all the requirements of this section (other than this clause) and for which Federal funds have not yet been reserved;

(5) the Commissioner determines that the construction will be undertaken in an economical manner and will not be of elaborate or extravagant design or materials; and

(6) the Commissioner determines that (in addition to the assurance required by section 753 of this title and such assurance as to title to the site as he may deem necessary) the application contains or is supported by satisfactory assurances—

(A) that Federal funds received by the applicant will be used solely for defraying the development cost of the project covered by such application,

(B) that sufficient funds will be available to meet the non-Federal portion of such cost and to provide for the effective use of the academic facility upon completion, and

(C) that the facility will be used as an academic facility during at least the period of the Federal interest therein (as defined in section 754 of this title).

Amendments of applications.

(c) Amendments of applications shall, except as the Commissioner may otherwise provide by or pursuant to regulation, be subject to approval in the same manner as original applications. [20 U.S.C. Sec. 718].

Sec. 751. Definitions.

As used in this chapter—

(a) (1) Except as provided in subparagraph (2) of this paragraph, the term "academic facilities" means structures suitable for use as classrooms, laboratories, libraries, and related facilities necessary or appropriate for instruction of students, or for research, or for administration of the educational or research programs, of an institution of higher education, and maintenance, storage, or utility facilities essential to operation of the foregoing facilities. Plans for such facilities shall be in compliance with such standards as the Secretary of Health, Education and Welfare may prescribe or approve in order to insure that facilities constructed with the use of Federal funds under this chapter shall be, to the extent appropriate in view of the uses to be made of the facilities, accessible to and usable by handicapped persons.

(2) The term "academic facilities" shall not include (A) any facility intended primarily for events for which

admission is to be charged to the general public, or (B) any gymnasium or other facility specially designed for athletic or recreational activities, other than for an academic course in physical education or where the Commissioner finds that the physical integration of such facilities with other academic facilities included under this chapter is required to carry out the objectives of this chapter, or (C) any facility used or to be used for sectarian instruction or as a place for religious worship, or (D) any facility which (although not a facility described in the preceding clause) is used or to be used primarily in connection with any part of the program of a school or department of divinity, or (E) any facility used or to be used by a school of medicine, school of dentistry, school of osteopathy, school of pharmacy, school of optometry, school of podiatry or school of public health, as these terms are defined in section 298b of Title 42. For the purposes of this subparagraph the term "school or department of divinity" means an institution, or a department or branch of an institution, whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation or to prepare them to teach theological subjects.

(f) The term "institution of higher education" means an educational institution in any State which—

(1) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(2) is legally authorized within such State to provide a program of education beyond high school;

(3) provides an educational program for which it awards a bachelor's degree, or provides not less than a

two-year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(4) is a public or other nonprofit institution; and

(5) is accredited by a nationally recognized accrediting agency or association listed by the Commissioner pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited:

(k) The term "nonprofit educational institution" means an educational institution owned and operated by one or more corporations or associations no part of the net earnings of which inures, or may lawfully inure to the benefit of any private shareholder or individual. [20 U.S.C. § 751(a)(1), (a)(2), (b), (k)].

Sec. 754. Period of Federal interest in project; recovery of payments.

(a) The Congress hereby finds and declares that, if a facility constructed with the aid of a grant or grants under subchapter I of II of this chapter is used as an academic facility for twenty years following completion of such construction, the public benefit accruing to the United States from such use will equal or exceed in value the amount of such grant or grants. The period of twenty years after completion of such

construction shall therefore be deemed to be the period of Federal interest of such facility for the purposes of this chapter.

(b) If, within twenty years after completion of construction of an academic facility which has been constructed in part with a grant or grants under subchapter I or II of this chapter—

(1) the applicant (or its successor in title or possession) ceases or fails to be a public or nonprofit institution, or

(2) the facility ceases to be used as an academic facility, or the facility is used as a facility excluded from the term "academic facility" by section 751(a)(2) of this title,

the United States shall be entitled to recover from such applicant (or successor) an amount which bears to the then value of the facility (or so much thereof as constituted an approved project or projects) the same ratio as the amount of such Federal grant or grants bore to the development cost of the facility financed with the aid of such grant or grants. Such value shall be determined by agreement of the parties or by action brought in the United States district court for the district in which such facility is situated. [20 U.S.C. § 754].

Sec. 757. Federal control over educational institutions prohibited.

No department, agency, officer, or employee of the United States shall under authority of this chapter, exercise any direction, supervision, or control over, or impose any requirements or conditions with respect to the personnel, curriculum, methods of instruction, or administration of any educational institution. [20 U.S.C. § 757].

STATEMENT OF CASE

Appellants, fifteen residents and citizens of the United States and of the State of Connecticut, and taxpayers of the United States, brought this action to enjoin the United States Secretary of Health, Education and Welfare and the United States Commissioner of Education from using Federal funds to finance the construction of facilities at defendant church related educational institutions pursuant to Title I of the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701-58 (1964), and for judgment declaring that such use was not authorized by the statute or, in the alternative, if authorized, was unconstitutional under the First Amendment of the United States Constitution. Joined as defendants were the chairman of the Commission on Aid to Higher Education of the State of Connecticut and four colleges in Connecticut whose applications for funds under the Act have been approved by him as well as the other defendants, as required by the Act.

A trial extending through five days was had before a special statutory district court of three judges, and the issues were orally argued and fully briefed by counsel for the respective parties.

The District Court held that the Higher Education Facilities Act authorized the grants of federal funds to defendant church related colleges and universities for construction of academic facilities and that government officials, both state and federal, had clearly acted within the scope of their authority in recommending and approving the challenged grants. It further held that the Higher Education Facilities Act and the grants were not violative of the establishment clause or the free exercise clause of the First Amendment of the Constitution of the United States.

SUMMARY OF ARGUMENT

The District Court, after carefully studying the provisions of the Higher Education Facilities Act of 1963, (the Act) and its legislative history, correctly concluded that church related colleges and universities were, in fact, encompassed within its terms.

In holding that the Act and grants were not violative of the Establishment Clause of the First Amendment, the District Court applied the *Schempp* test to the educational function of the church related colleges and universities and properly concluded that the Act passed muster as having a secular purpose of increasing the student enrollment capacity of the nation's institutions of higher education and a primary effect of aiding education without advancing or inhibiting religion.

The Act, as construed by the District Court, does not violate the Free Exercise Clause of the First Amendment because it does not coerce the appellants in the practice of their religion but is, in fact, religiously neutral.

ARGUMENT

I. THE HIGHER EDUCATION FACILITIES ACT OF 1963 AUTHORIZES THE CHALLENGED GRANTS.

In 1963, the Congress, fully cognizant of the urgent public need for additional higher education facilities to accommodate the rapidly increasing number of young people seeking higher education, adopted the Higher Educational Facilities Act, which was intended to encourage the expansion of facilities at colleges and universities throughout the country by providing financial assistance for that purpose. The federal grant provides only a part of the moneys needed to construct a particular facility at an eligible college; the bulk of the necessary moneys being supplied by the college itself. (Plain-

tiffs Exhibit 125, Par. 13(7); R. App., p. 78). No prohibition was incorporated in the Act limiting such assistance to publicly supported colleges. To the contrary, Congress specifically included non-profit colleges and universities in the largess of the Act (§ 751f, supra) undoubtedly recognizing the enormous contribution made by such private institutions in providing educational opportunities for young people at the college level and also recognizing that, "private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence and experience". (*Board of Education of Central School District No. 1* v. *Allen*, 312 U.S. 236, 247).

Nor can it be successfully argued Congress was unmindful that the provisions of the Act would benefit church related colleges and universities which comprise a large percentage of the institutions of higher education in the United States. The legislative record evidences the fact that several amendments to deny the benefits of the Act to such institutions were defeated.[1] Additionally, the legislative history is replete with debates between proponents and opponents of the Act which overwhelmingly support the conclusion that the ultimate Congressional intent was to grant the benefits of the Act to qualifying church related colleges and universities.[2]

Undoubtedly, the desire of members of Congress to insure that the Act could not be construed as an attempt to advance religion culminated in the inclusion of § 751(a) (2) which specifically provides that the term "academic facilities" shall not include "(C) any facility used or to be used for sectarian instruction or as a place of religious worship" or "(D) any facility which . . . is used or to be used primarily in connection with any part of the program of a school or department of divinity, . . ."

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[1]109 Cong. Rec. 19492-96 (1963).
[2]See generally 1963 U.S. Code Cong. and Adm. News, pp. 1172-1202.

The instant grants to defendant colleges and universities which have been challenged by the appellants are as follows:

1. Sacred Heart University submitted an application to the Connecticut Commission for and received a Title I grant for construction of a new library.

2. Annhurst College submitted an application to the Connecticut Commission for and received a Title I grant for construction of a new music, drama and arts building with an auditorium to be used for general academic programs.

3. Fairfield University submitted an application to the Connecticut Commission for and received a Title I grant for construction of a new library building.

4. Fairfield University also submitted an application to the Connecticut Commission for and received a Title I grant for construction of a new science building to house the biology, chemistry, mathematics and physics departments, the computer instructional and research division and some biology-related functions of the psychology department; the grant requested was for construction of the science building minus the computer facilities.

5. Albertus Magnus College submitted an application to the Connecticut Commission for and received a Title I grant for construction of academic facilities to be located in a general academic building containing classrooms, faculty and administrative offices, faculty seminar room, student study area, language laboratories and adjoining offices and necessary related service and maintenance facilities; the grant was requested for construction of two language laboratories and adjoining

offices and necessary related service facility in the general academic building. (R. App., pp. 61, 62).

We submit that the above-quoted language and the record fully support the lower court's conclusion that the challenged grants were to be used for secular functions of the respective defendant colleges and universities and were authorized under the Act.

The appellants in their brief (pp. 12-14) readily admit that after thoroughly scrutinizing the language of the Act they can point to no specific provision to support their position that the benefits of the Act were intended to be withheld from church related colleges and universities. Absent an affirmative argument, the appellants necessarily fall back on the negative approach basing their argument on the fact that, despite extensive debate in the Congress, church related colleges and universities were not specifically included in the provisions of the Act. However, their argument has no efficacy in the light of the fact that specific amendments to exclude church related educational institutions from the benefits of the Act were proposed to the Congress and voted down. (Footnote 1, supra).

II. GOVERNMENT AID TO EDUCATION.

A. Historical Posture of Connecticut

Connecticut is known as the "Constitution State" because it was the birthplace of the world's first written constitution — The Fundamental Orders of Connecticut were adopted in 1639.

Accordingly, with the numerous legal attacks on the slightest interest of the government in the religious beliefs of its citizens pending in our courts, it would seem an appropriate moment for every citizen to review the beginning of

this great country commencing with the departure of the Pilgrims from England to avoid religious oppression by the King of England and their seeking of a land where each person would be free to practice his religious beliefs without fear of government interference.

It would be well to note that the flight of the Pilgrims was from religious oppression, not from God. Those who advocate nothing less than absolute separation of church and state might do well to ponder the fact that this nation was founded by a religious people who believed in God and were dedicated to such belief.

The First Amendment to the Federal Constitution prohibits governmental establishment of religion as well as governmental interference with the free exercise of religion. This provision is applied to the states by virtue of the due process clause of the Fourteenth Amendment. *Illinois ex rel. McCollum* v. *Board of Education,* 333 U.S. 203 (1948). The corresponding provisions of the Connecticut Constitution adopted in 1965 are found in Article First, Section 3 and Article Seventh. The Connecticut Supreme Court had occasion to consider both the State and Federal constitutional provisions in 1960 in deciding the case of *Snyder* v. *Newtown,* 147 Conn. 374, in which the statutory provision for bus transportation to parochial schools was upheld. The case was appealed to this Court which dismissed "for want of a substantial federal question" (365 U.S. 299). Prior to reaching its decision, the state court gave a brief resume of the history behind the constitutional provision which, because it cannot be further condensed or improved upon, I set out below (pp. 383 to 387):

> "A very brief resume of the history behind article seventh, § 1, of our constitution, which was adopted in 1818, is helpful to an understanding of the meaning and

intent of the language used. The preamble to the Fundamental Orders, Connecticut's, and the world's, first written constitution creating a government, states, after reciting the need for "an orderly and decent Government established according to God," that the founders, that is, the inhabitants of Windsor, Hartford and Wethersfield, do "associate and conjoin . . . to be as one Public State or Commonwealth; and do . . . enter into Combination and Confederation together, to maintain and preserve the liberty and purity of the Gospel of our Lord Jesus which we now profess, as also the discipline of the Churches, which according to the truth of the said Gospel is now practiced amongst us; as also in our civil affairs to be guided and governed according to such Laws . . . as shall be . . . decreed" in the manner provided in the subsequent orders. The founders were a homogeneous people belonging, for the most part, to what was to them the one and only church. Guardianship of that church was a basic policy with them, and they regarded the state as the secular arm of the church. See 1 Col. Rec. 2, 21, 524, 525; Cobb, The Rise of Religious Liberty in America, p. 242; Coons, The Achievement of Religious Liberty in Connecticut, p. 3 (Conn. Tercentenary Commn., Com. on Hist. Pub., Pamph. No. 60). While the church and state were bound closely together, the privilege of a freeman was never conditioned upon church membership. Cobb, op. cit., p. 245. Ecclesiastical societies, however, were organized by the general court, that is, the legislative body; churches were erected at public expense; the minister was called by a town meeting; and the regular support of the church was raised by a tax on all. Id., 246; Greene, The Development of Religious Liberty in Connecticut, p. 58.

In 1669, the general court gave to dissenters from the approved Congregational churches "allowance of

their perswasion and profession in church wayes or assemblies without disturbance"; 2 Col. Rec. 109; but they were still taxed to support the approved churches. Coons, op. cit., p. 11; Cobb, op. cit., pp. 255, 264. Connecticut witnessed no such persecutions as occurred in other colonies. As tolerance gradually increased, further concessions were made to dissenters; these had the effect of enabling dissenters to pay for the support of the churches of their choice rather than the approved churches. Acts & Laws, 1769, pp. 169-171 (acts of May 11, 1727; May 8, 1729; Oct. 9, 1729); Statutes, 1784, pp. 21, 22; Cobb, op. cit., p. 501; Coons, op. cit., p. 22. Down to the time of the adoption of article seventh of the constitution of 1818, however, there was still a very large measure of authority in the general court over church affairs, with power to compel support of the church and attendance at services. The purpose of article seventh, and it finds its counterpart in the federal constitution and other state constitutions, was, in the words of Jefferson, to erect "a wall of separation between Church and State." 16 Writings of Thomas Jefferson 282; see Everson v. Board of Education, 330 U.S. 1, 16, 67 S. Ct. 504, 91 L. Ed. 711; Reynolds v. United States, 98 U.S. 145, 164, 25 L. Ed. 244; Jewett v. Thames Bank, 16 Conn. 511, 516; Second Ecclesiastical Society v. First Ecclesiastical Society, 23 Conn. 255, 274; Cobb, op. cit., pp. 248, 270, 501, 512, 513.

Let us turn now to the history of tax exemption in this state, because it throws light upon the meaning and intent of article seventh. Lands granted for the ministry of the gospel were exempted as early as 1684. 3 Col. Rec. 158; Statutes, 1702, p. 64. The exemption of church property continued during the following century and was in effect when the constitution was adopted by a convention in September, 1818, and ratified by the

people in October, 1818. Statutes, 1784, p. 111; id., 1796, p. 252; id., 1808, p. 433. At the session of the General Assembly the following May, another law was passed exempting church property from taxation. Public Acts 1819, c.2, § 14. The Revision of 1821 listed property which was subject to taxation; it did not specifically list church property nor specifically exempt it. Statutes, 1821, p. 444. It did, however, exempt ministers of the gospel from the poll tax, and their houses, lands or other taxable property to the amount of $2500 from the property tax. Statutes, 1821, pp. 448, 449. In 1822, the General Assembly repaired the omission in the Revision of 1821 and specifically exempted buildings occupied as "colleges, academies, school houses, churches or infirmaries." Public Acts 1822, c.29. This provision appears in the compilation of 1835. Statutes, 1835, p. 528; see Masonic Building Assn. v. Stamford, 119 Conn. 53, 57, 174 A. 301; Yale University v. New Haven, 71 Conn. 316, 333, 42 A. 87. Exemption of church property has been continued by the legislature in every compilation or revision of the general statutes since then to the present time. Statutes, 1838, p. 602; id., 1849, p. 603, § 11; id., 1854, p. 838, § 6; Rev. 1866, p. 707, § 6; Rev. 1875, p. 154, § 12; Rev. 1888, § 3820; Rev. 1902, § 2315; Rev. 1918, § 1160; Rev. 1930, § 1163; Rev. 1949, § 1761; Rev. 1958, § 12-81. A practical construction placed upon a constitutional provision immediately after its adoption and consistently and repeatedly followed by the legislature for over a century thereafter is most persuasive. Cahill v. Leopold, 141 Conn. 1, 14, 103 A. 2d 818; Water Commissioners v. Curtis, 87 Conn. 506, 511, 89 A. 189. The continued legislative exemption of church property from taxation is strong evidence of the meaning of the constitutional prohibition against compulsory support of a church.

Exemption from taxation is the equivalent of an

appropriation of public funds, because the burden of the tax is lifted from the back of the potential taxpayer who is exempted and shifted to the backs of others. Lyman v. Adorno, 133 Conn. 511, 516, 52 A. 2d 702. The owners of tax-exempt property in the community derive the same benefits from government as other property owners but pay no property taxes for those benefits. This is true whether the relief from taxation be considered an exemption, as the legislature has described it, or results from a policy of considering church property not ratable for tax purposes. We conclude that the word "support" in article seventh was never intended to be employed in so narrow a sense as to prevent every sort of incidental public assistance to, and encouragement of, religious activity."

The decision in the *Snyder* case validating state aid for transportation of parochial school students was an enlargement of the judicial attitude that assistance to private agencies for public purposes was not proscribed by constitutional provisions. In the prior case of *Legat* v. *Adorno*, 138 Conn. 134 (1951), the Court had sustained the constitutionality of an appropriation to a non-profit private hospital for capital improvements on the ground that the hospital performed a public purpose in caring and treating persons suffering from chronic or other diseases, saying at page 148:

> " 'It is well settled that a private agency may be utilized as the pipe-line through which a public expenditure is made, *the test being not who receives the money, but the character of the use for which it is expended.*' " (emphasis supplied).

B. Historical Posture of The United States

The Federal Government has been assisting education in this country without distinguishing between secular and

sectarian institutions at least since 1820, and probably earlier. In that year Congress provided grants of federal funds to be used by various religious groups for the education of American Indians. References to said educational grants are found in the case of *Quick Bear v. Leupp*, 210 U.S. 50 (1908), wherein certain Sioux Indians challenged the constitutionality of a contract between the Commissioner of Indian Affairs and the Bureau of Catholic Missions of Washington for the care, education and maintenance of a number of Sioux Indian pupils at the St. Francis Mission Boarding School. Payments under the contract were to be made from the Sioux Treaty Fund which had been established by the government for the benefit of the Sioux tribe in return for the ceding of certain lands to said government. The claim was advanced that such payments violated certain provisos in the Indian Appropriation Acts forbidding the use of appropriated funds "for education in any sectarian school."

After holding that the provisos had no application to treaty funds, Chief Justice Fuller, in a unanimous decision, continued at p. 81:

> "Some reference is made to the Constitution, in respect to this contract with the Bureau of Catholic Indian Missions. It is not contended that it is unconstitutional, and it could not be. Roberts v. Bradfield, 12 App. D.C. 475; Bradfield v. Roberts, 175 U.S. 291, 44 L. Ed. 168, 20 Sup. Ct. Rep. 121."

The *Bradfield* case cited in the *Quick Bear* case is an 1899 decision of this Court sustaining a federal statute authorizing direct federal aid to a hospital owned and controlled by a corporation composed of members of a monastic order or sisterhood of the Roman Catholic Church.

Through the years the federal government has dispensed millions of dollars which could be said to have incidentally

or indirectly aided religion. For example, benefits of the National School Lunch Act are available to students in private schools (42 U.S.C.A. § 1751, et seq.). Also, private hospitals may apply for funds under the Hospital Survey and Construction Act of 1936 (42 U.S.C.A. 291, et seq.). Evidently Congress has not recognized a constitutional prohibition as long as a secular purpose is being aided or advanced.

III. THE ESTABLISHMENT CLAUSE.

The First Amendment clause prohibiting an establishment of religion was intended, according to Thomas Jefferson, writing in a letter to Danbury, Connecticut Baptists, to erect "a wall of separation between church and state". *16 Writings of Thomas Jefferson,* 281-282 (1903); *Reynolds* v. *United States,* 98 U.S. 145, 164 (1878). However, the First Amendment has been construed by this Court as safeguarding freedom of religion, rather than freedom from religion. *Everson* v. *Board of Education,* 330 U.S. 1 (1947); *Zorach* v. *Clauson,* 343 U.S. 306 (1952).

This Court in *Everson* v. *Board of Education,* 330 U.S. 1, a five to four decision, upheld a New Jersey statute authorizing town boards of education to reimburse parents for money spent to transport their children on public school buses to public and parochial schools. The statute had been challenged by a taxpayer on the ground that, inter alia, it violated the establishment clause. Mr. Justice Black, on behalf of himself, Chief Justice Vinson and Justices Reed, Douglas and Murphy, rejected the establishment challenge, stating at page 17:

> "The language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their religion. It cannot exclude Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists,

non-believers, Presbyterians or the members of any other faith because of their faith from receiving the benefits of public welfare legislation. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state

to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

Zorach v. *Clauson,* 343 U.S. 306, involved the question of "released time" which permitted public schools to release students during the normal school day to go to private centers for religious instructions or devotional exercises. Only those students whose parents made written request were released, the others remained in the classroom. This Court decided that "released time" neither prohibited the free exercise of religion nor violated the establishment clause of the First Amendment to the Federal Constitution. Justice Douglas in the majority opinion made the following noteworthy comments regarding the relationship between church and state at page 312, et seq."

"The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other — hostile, suspicious, and even unfriendly . . . . We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be

to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. . . . We follow the McCollum case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion."

The test to be applied in establishment clause cases was first articulated by this Court in *Abington Township School District* v. *Schempp*, 374 U.S. 203 (1960), which considered the constitutionality of a statute of Pennsylvania requiring at least ten verses from the Holy Bible to be read, without comment, at the opening of each public school on each school day. Any child could be excused from the Bible reading upon written request of his parent or guardian. This Court affirmed a Circuit Court decision holding the state statute to be violative of the establishment clause. Mr. Justice Clark, speaking for the court, laid down the test at p. 222:

"As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: *What are the purpose and primary effect of the enactment?* If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that *to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.*

Everson v. *Board of Education,* 330 U.S. 1." (emphasis supplied).

This Court affirmed the test in *Board of Education of Central District No.* 1 v. *Allen,* 392 U.S. 236, (1968), involving the constitutionality of a New York law which required local public school authorities to lend textbooks without charge to all students in grades seven to twelve in private as well as public schools. In a split decision (6 to 3), this Court recognized the secular educational function performed by private and parochial schools holding that the Textbook Loan Law benefited school children thereby serving a secular educational function rather than benefiting a religious denomination.

This Court "has long recogized that religious schools pursue two goals, religious instruction and secular education." (id. at 245). There is substantial case law supporting the power of states to establish standards which must be met by private schools. Indeed, the Court said at page 247, "if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function."

Private education has played a significant role in raising national levels of knowledge, competence and experience. Private religious schools are performing a secular function as well as a sectarian function. Not all teaching in a sectarian school is religious. Nor is the process of secular and religious training so intertwined that secular textbooks furnished to students by the public will become instruments in the teaching of religion. (id. at pages 247, 248).

We submit that it was never the purpose of the Establishment Clause of the federal Constitution or the comparable articles of the Connecticut Constitution to prohibit coopera-

tion between the state and religious organizations when a valid secular purpose was fulfilled. Accordingly, the expenditure of public funds to transport children to parochial schools was held constitutional by the Connecticut Supreme Court in *Snyder*. This Court recognized such expenditures of public monies as being primarily in the interest of public health, safety and education in the *Everson case*. In like manner, the Connecticut Sunday closing law was upheld by the State Supreme Court as primarily decreeing a day of rest in the interests of the physical and moral welfare of the community rather than as religious legislation. *State* v. *Shuster*, 145 Conn. 554, 145 A. 2d 196 (1958). To like effect the decision of this Court in *McGowan* v. *Maryland*, 366 U.S. 420 (1961).

The permissible area of government involvement with religion has been rationalized by some commentators as justified not only as religious neutrality, but also as political neutrality. Basically, the concept of political neutrality allows State activity in connection with a religiously affiliated organization where the secular purpose of such organization warrants inclusion in the scheme of governmental operation.

> "The principle of political neutrality recognizes that religious associations operate in the temporal realm and accordingly can be legitimately included among the beneficiaries of the prevailing order established and sustained by the State." Giannella, *Religious Liberty, Non-Establishment and Doctrinal Development, Part II. The Non-Establishment Principle*. 81 Harvard L.R. 513, 519 (1968).

In this "neutral atmosphere", zoning regulations requiring parochial and other private schools to indicate their proposed land use and general building plans to a town planning and zoning commission have been held not to discriminate against religion. *St. John's Roman Catholic Church*

Corporation v. *Town of Darien, et al,* 149 Conn. 712, 184 A. 2d 42 (1962).

It should be noted that each of the facilities for which the defendant institutions received federal grants under the Act were dedicated to secular educational purposes and not to religious purposes. It should also be obvious that without the expansion of private college facilities the State of Connecticut would be unable to expand the facilities at public educational institutions to accommodate the flood of applicants seeking the benefit of higher education. Circumstances, therefore, dictate that government and private colleges cooperate to meet the educational crisis in higher education.

Applying the secular purpose and primary effect test which was first enunciated in *Schempp* and restated in *Allen,* we submit that the Act and grants meet both requirements. The declaration of congressional policy and purpose is expressed in the preamble of the Act as follows:

> "The Congress hereby finds that the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education. The Congress further finds and declares that these needs are so great and these steps so urgent that it is incumbent upon the Nation to take positive and immediate action to meet these needs through assistance to institutions of higher education, including graduate and undergraduate institutions, junior and community colleges, and technical institutes, in providing certain academic facilities." (§ 701).

The lower Court properly found that the findings and policy statement of Congress were unassailable and therefore correctly concluded that the Act had a "secular purpose of increasing the student enrollment capacity of the Nation's institutions of higher education — an existing urgent public need — and that the Act does not have the purpose of promoting religion of any kind." (R. App., p. 49).

In addressing itself to the second requirement of the test that the Act have a primary effect which neither advances nor inhibits religion, the lower court found that the focus of the test as applied in *Allen* "is the function, secular or religious, which the government aid subsidizes — not the nature of the institution, secular or religious, which receives the aid." (R. App., p. 49).

The lower court went on to quote the summarization by this Court in the *Allen* case of the relationship of the sectarian function to the secular function of private schools, including parochial schools:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial

schools are performing, in addition to their sectarian function, the task of secular education." (R. App., p.50).

The duality of functions of church related institutions must have been in the forefront of collective Congressional thought when it defined the term "institution of higher education" without regard to church relationship (§ 751(f)) and excluded from the definition of "academic facilities" entitled to be qualified for grants those facilities which were used or to be used for religious worship or instruction. (§ 751(a)(2)(C) and (D), supra). These provisions of the Act make it abundantly clear that it is the *use of the facility* to be constructed rather than the *nature of the institution* at which the facility will be constructed which is determinative of grant qualification under the Act.

This Court has long recognized the selfish interest of government in the education of its citizenry, This interest transcends the individual interests of its citizens and the collective interests of any organization, secular or religious. *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370, 375 (1930).

We submit the reasoning of the lower court is sound and finds strong support in the equally sound judgment of this Court in the *Bradfield* case, supra, sustaining a federal statute authorizing direct federal aid to a hospital owned and controlled by a corporation composed of members of a monastic order or sisterhood of the Roman Catholic Church and is in accord with the decision of the Connecticut Supreme Court in *Legat* v. *Adorno*, supra, which found the test to be not who receives the money, but the character of the use for which it is expended.

Such unanimity of judicial thought and opinion should not be disturbed.

IV. RECENT COURT DECISIONS.

A. Walz v. Tax Commission of City of New York

The decision of the lower court in the instant case was rendered before the judges could avail themselves of this Court's reasoning in *Walz* v. *Tax Commission of the City of New York*, 90 S. Ct. 1409 (1970), which upheld the constitutionality of governmental property tax exemptions to religious organizations for religious properties used solely for religious worship.

However, the application of the rationale of this Court in the *Walz* case does not overrule or render ineffective the decision of the lower court in the instant case; to the contrary, it supports and strengthens that decision.

The appellants' emphasis on the so-called *Everson* test of no-aid to religion loses any efficacy it might formerly have had in view of the restatement by this Court of the legislative purpose and primary effect test in citing with approval the *Allen* case. Id., at 1413. As the appellants suggest, quoting a case with approval is hardly an effective way to repudiate it.

The *Walz* decision also effectively eliminates the child-benefit theory from consideration since this Court recognized that making textbooks available to pupils in parochial schools in common with public schools in the *Allen* case constituted permissible "*'aid' to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books.*" (Emphasis supplied) (Id., at 1413).

In our view this Court has given the *Schempp* test a new dimension in *Walz by* proscribing "excessive entanglement" of government in religion which might lead to the advancement or inhibition of religion.

In the instant case there is not even a semblance of the proscribed involvement, since § 757 of the Act, supra, specifically prohibits federal control over any educational institution which receives a grant thereunder.

In an attempt to convince the Court that the Act will lead to "excessive entanglement" of the Government with religion, the appellants cite § 754(b) of the Act, supra, which provides that if at any time within twenty years after construction of the facility it is used for religious worship or instruction the institution must make pro-rata restitution to the Government. However, no evidence was introduced by the appellants which would indicate that the Government intended to subject the colleges and universities to continuous and sustained surveillance for twenty years. As Mr. Chief Justice Berger noted in *Walz*, Id., at p. 1416, "there is no lack of vigilance on this score by those who fear religious entanglement in government" and, it is submitted, the Government will presume that the challenged facilities are being used for the secular purposes for which they were constructed until such time as a report is received to the contrary from a vigilant citizen.

B. Lemon v. Kurtzman

This case involved the constitutionality of the Pennsylvania Nonpublic Elementary and Secondary Education Act of 1970 which authorized payment of state funds to nonpublic elementary and secondary schools as reimbursement for teaching certain secular subjects. A special three-judge district court rendered a 2-1 decision on November 28, 1969 holding the Act did not violate the establishment clause. In arriving at its decision, the Court applied the rationale of the *Allen* case.

This case was also decided before the *Walz* decision, is on appeal to this Court (No. 1189, O. T. 1969) and is scheduled for argument immediately prior to the instant case.

Since the issues in the *Lemon* case will be thoroughly briefed by counsel for the respective parties, we will not burden this Court with a detailed analysis of the decision. Suffice it to say that we concur with the rationale of the decision and respectfully commend it to this Court.

C. Dicenso v. Robinson

This case involved the constitutionality of the Rhode Island Salary Supplement Act which provided salary supplements to teachers in nonpublic schools.

The special three-judge district court held the Act to be violative of the establishment clause in a decision rendered June 25, 1970. The court rejected the *Schempp-Allen* test declaring it to be confusing and thus useless. The decision is contra to the rationale of the respective district courts in *Lemon* and the instant case.

Since the case has been appealed to this Court (No. 569-570, O. T. 1970), the issues in the case will be thoroughly briefed for the Court's benefit by counsel for the respective parties so that we will refrain from further burdening the Court with a detailed analysis in this brief.

D. State Court Cases

In *Horace Mann League* v. *Board of Public Works*, 242 Md. 645, 220 A. 2d 51, *cert. denied, appeal dismissed*, 385 U.S. 97 (1966), the Maryland Court of Appeals held that the constitutionality of direct construction grants under the establishment clause was dependent on whether the recipient institution was "sectarian". The court set up numerous factors which were to be considered in arriving at such a conclusion.

We subscribe to the statement of the district court in the instant case that the rationale of that court is not consistent

with the *Allen* secular purpose and primary effect test and should not be considered by this Court.

The most recent state court decision holding a state statute granting aid to parochial and private schools to be constitutional is Michigan case No. 52933, *In the Matter of the Legislature's Request for an Opinion on the Constitutionality of Chapter 2 of Amendatory Act No. 100 of the Public Acts of* 1970. (*Enrolled Senate Bill No.* 1082) decided September 14, 1970. In a 4-3 decision the Michigan Supreme Court held that the Act was *not violative* of the U.S. Constitution.

It is anticipated that the opinion of the Michigan Court will be available for the use of this Court before oral argument and copies will be supplied to the clerk.

V. THE FREE EXERCISE CLAUSE.

The appellants also claim that the use of Federal funds to finance church related educational institutions constitutes compulsory taxation for religion and therefore impairs their free exercise of religion.

Since the appellants use only three short paragraphs in arguing their free exercise claim, we submit they are less than confident that their argument will prove convincing to this Court.

The short answer to their claim is that the lower court properly dismissed the free exercise claim as being without merit since they had not shown that the Act coerces them as individuals in the practice of their religion. Such coercion is a prerequisite to a finding that a legislative enactment abridges the free exercise clause. *Allen*, supra, pp. 248-249.

CONCLUSION

For the reasons set out above, it is respectfully submitted that the Higher Education Facilities Act of 1963 and grants thereunder are not violative of the establishment clause or the free exercise clause of the First Amendment of the Constitution of the United States and, therfore, the decision of the lower court should be affirmed.

Respectfully submitted,

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September 18, 1970

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OTHER AUTHORITIES:

J. Choper, *The Establishment Clause and Aid to Parochial Schools,* 56 Calif. L. Rev. 260 (1968) 44, 70
R. Drinan, *Does State Aid to Church-Related Colleges Constitute an Establishment of Religion?—Reflections on the Maryland College Cases,* 1967 Utah L. Rev. 491 25
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M. Pattillo and D. Mackenzie, Church-Sponsored Higher Education in the United States (1966) 74
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 153

ELEANOR TAFT TILTON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RAISNER, ELISABETH R. SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANSHARD, JAY S. ROTH, CARL W. SCHAEFER, NORMAN T. DAVID, HERBERT T. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PENDLETON,
Appellants,

v.

ELLIOT L. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY, ALBERTUS MAGNUS COLLEGE,
Appellees.

On Appeal From a Three-Judge United States District Court For the District of Connecticut

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BRIEF OF APPELLEE COLLEGES AND UNIVERSITIES

OPINION BELOW

The opinion of the United States District Court for the District of Connecticut is reported at 312 F. Supp. 1191 (1970). It is reprinted in full starting at page 37 of the Joint Appendix (J.A.).

JURISDICTION

The District Court entered judgment in this case on March 19, 1970. J.A. 68. Notice of appeal was filed with the District Court on April 8, 1970. J.A. 68. This Court noted probable jurisdiction on June 22, 1970. 399 U.S. 904. The jurisdiction of this Court to hear this case on direct appeal rests on 28 U.S.C. § 1253. *Flast* v. *Cohen*, 392 U.S. 83 (1968).

CONSTITUTIONAL PROVISION INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTE INVOLVED

Appellants draw into question the constitutionality of the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701-58 (1964). Most of the relevant provisions of that statute are reprinted as an Appendix to appellants' brief.

QUESTIONS PRESENTED

1. Whether the Higher Education Facilities Act of 1963 can be construed in a manner that would exclude from the Act's Title I grant program otherwise eligible institutions of higher education solely because such institutions are church-related.

2. If the Act cannot be so construed, whether the inclusion of church-related colleges and universities in a major federal program designed to expand educational opportunities is contrary to the Establishment and Free Exercise Clauses of the First Amendment.

STATEMENT OF THE CASE

A. THE CHALLENGED STATUTE

In the early 1960s, the Nation's colleges and universities faced an acute crisis of over-crowding as more and more young Americans sought the advantages of higher education. Congress responded to that crisis by enacting the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701-58. In transmitting to Congress his legislative proposals that were incorporated in that statute, President Kennedy succinctly summarized the problems confronted by institutions of higher education:

> "The long-predicted crisis in higher education facilities is now at hand. For the next 15 years, even without additional student aid, enrollment increases in colleges will average 340,000 each year. If we are to accommodate the projected enrollment of more than 7 million college students by 1970—a doubling during the decade—$23 billion of new facilities will be needed, more than three times the quantity built during the preceding decade. This means that, unless we are to deny higher education opportunities to our youth, American colleges and universities must expand their academic facilities at a rate much faster than their present resources will permit." H.R. Doc. No. 54, 88th Cong., 1st Sess. 7 (1963).

The concerns expressed by President Kennedy were repeatedly echoed in the congressional hearings on his legislative proposals for higher education and in the floor debates which preceded the passage of the Higher Education Facilities Act.[1] A consistent theme of those

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[1] See generally, *Hearings on H.R. 3000 Before the House Comm. on Education and Labor*, 88th Cong., 1st Sess. (1963); *Hearings on S. 500 Before the Education Subcomm. of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. (1963); *Hearings*

hearings and debates was that, without a substantial infusion of federal aid, the Nation's colleges and universities would simply be unable to undertake the needed expansion of their facilities.[2]

The Higher Education Facilities Act seeks to assist institutions of higher education to expand their enrollment capacities by providing grants and loans for the construction of academic facilities. The appellants have challenged only Title I of the Act, which authorizes grants of federal funds to public and private colleges and universities to finance, in part, the construction of undergraduate academic facilities. 20 U.S.C. §§ 711-21. The critical showing that must be made by a college or university seeking a Title I grant is that the facilitiy to be constructed with the grant "will . . . result in an urgently needed substantial expansion of the institution's student enrollment capacity, capacity to provide needed health care to students or personnel of the institution, or capacity to carry out extension or continuing education programs." 20 U.S.C. § 716.

The Title I grant program is administered jointly by the federal and state governments. To enable its institutions of higher education to participate in that program, a state is required to establish an agency to carry out the state's administrative functions under the Act. 20 U.S.C. § 715. The most important of those

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on S. 580 Before the Education Subcomm. of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. (1963); 109 Cong. Rec. 14941-94, 19215-20, 19373-405, 19467-500, 19877-92, 21123-36, 24053-69 (1963).

[2] See, *e.g.*, *Hearings on H.R. 3000, supra*, at 533-40 (statement and testimony of Dr. Mason W. Gross, President of Rutgers University); *id.* at 749, 753-54 (testimony of Dr. Fred H. Harrington, President of the University of Wisconsin).

functions are to screen applications for grants from colleges and universities and to establish relative priorities among eligible projects to assure that available federal funds will have a maximum impact on increasing enrollment capacity. 20 U.S.C. §§ 715, 717.[3] Projects approved by the state agencies are forwarded to the United States Office of Education for further review to assure compliance with all requirements of the statute and the regulations promulgated thereunder. See Findings of Fact ¶¶ 21-25, J.A. 60-61.

Title IV of the challenged statute limits Title I grants in ways directly relevant to the appellants' claims. Eligible institutions of higher education are defined in a religiously neutral manner. The statute requires such institutions to be, *inter alia,* nonprofit, legally authorized by the state in which they are located to provide a program of education beyond high school, and accredited. 20 U.S.C. § 751(f). The statute also excludes

> "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . any facility which (although not a facility described in the preceding clause) is used or to be used primarily in connection with any part of the program of a school or department of divinity. . . ." 20 U.S.C. § 751(a)(2).

Finally, the statute gives the federal government a twenty-year interest in all academic facilities funded under the Act, and it authorizes the government to

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[3] The four appellee colleges and universities are located in Connecticut and, consequently, the evidence at trial relating to the administration of the challenged statute focused on the procedures followed by the Connecticut Commission on Aid to Higher Education. See Findings of Fact ¶¶ 13-20, J.A. 58-60.

recover a prorated share of the value of any facility which is used for a prohibited religious purpose, as defined by § 751(a)(2), during the twenty-year period. 20 U.S.C. § 754.

B. THE PROCEEDINGS BELOW

The appellants, fifteen federal taxpayers, filed their complaint with the United States District Court for the District of Connecticut on September 25, 1968, asserting the basic claims they now ask this Court to review —namely, that the challenged statute does not authorize grants of federal funds to church-related colleges and universities and that, if such grants are authorized, Title I to that extent contravenes the Establishment and Free Exercise Clauses of the First Amendment. The named defendants, and the appellees herein, were four Catholic colleges and universities in Connecticut that have been the recipients of a total of five Title I grants[4] and the federal and state officials responsible for administering those grants. The four institutions are Fairfield University, Sacred Heart University, Albertus Magnus College and Annhurst College.

A three-judge court was convened, as requested by the appellants, and all of the factual issues in the case were fully tried before that court. A total of 155 documentary exhibits were admitted in evidence, and testimony was taken from 22 witnesses. The appellants' evidence consisted entirely of documents obtained from the various appellees through pre-trial discovery

[4] Fairfield University received Title I grants for the construction of a library and a science building; Sacred Heart University received a Title I grant for the construction of a library; Annhurst College received a Title I grant for the construction of a fine arts building; and Albertus Magnus College received a Title I grant for the construction of a language laboratory.

and stipulations of fact entered into with the appellees. The appellants' central legal theory was that the Establishment Clause prohibited the granting of federal funds to so-called "sectarian" educational institutions, and their evidence focused on the alleged "sectarian" nature of the four appellee institutions. As a standard of sectarianism, the appellants relied on the criteria devised by the Maryland Court of Appeals in *Horace Mann League* v. *Board of Public Works,* 242 Md. 645, 220 A.2d 51, *cert. denied, appeal dismissed* 385 U.S. 97 (1966).

The legal theory of the appellee colleges and universities had a far different focus. Relying principally on *Board of Education* v. *Allen,* 392 U.S. 236 (1968), the appellee institutions contended that the Establishment Clause issue turned on the nature of the educational function being subsidized by the federal funds, and not the religious or nonreligious nature of the institution receiving those funds. For that reason, the appellees objected to all evidence offered by the appellants to show the alleged "sectarian" nature of those schools, Trial Transcript 142-50, 161-62, and a principal thrust of the evidence offered by the appellee institutions was that the academic facilities funded with the federal money at their campuses were being used or would be used for strictly secular purposes. See J.A. 101-21. In addition, the appellee institutions presented rebuttal evidence through testimony to correct the distorted picture the appellants attempted to draw of those schools through documentary evidence.

After post-trial briefing and extended post-trial arguments, the District Court ruled unanimously that the challenged statute and the Title I grants received by the appellee institutions did not contravene the Es-

tablishment and Free Exercise Clauses. The District Court faithfully followed and applied the controlling constitutional principles articulated by this Court's decisions. The District Court first ruled that church-related institutions of higher learning were not excluded from receiving Title I grants because of their church relationships, as long as they satisfied the religiously neutral criteria for eligibility under the statute. It then held that the purpose and primary effect test prescribed by *Board of Education* v. *Allen,* 392 U.S. 236, 243 (1968), governed appellants' Establishment Clause claim. In applying that test, the District Court examined only the educational function being subsidized by the federal funds and found that function to be wholly secular. Not only did the District Court reject the appellants' invitation to decide the Establishment Clause issue according to the so-called "sectarian" nature of the appellee institutions, but it also declined to enter the findings of fact sought by appellants concerning the character or nature of those schools. Finally, the District Court relied expressly on *Board of Education* v. *Allen,* 392 U.S. 236, 248-49 (1968), in finding no merit in appellants' Free Exercise claim.

SUMMARY OF ARGUMENT

I.

Appellants' suggestion that the Higher Education Facilities Act be construed to exclude church-related colleges and universities from participation in the Title I grant program is at odds with the Act's legislative history and this Court's decisions. The hearings and debates that preceded enactment of the statute demonstrate that grants to church-related institutions were clearly contemplated by Congress. In fact, the Senate defeated two amendments that would have ex-

cluded all church-related schools from participation in the Title I grant program.

A statute can be construed to avoid constitutional questions only if such a construction is "fairly possible." The construction of the contested statute is not fairly possible because it would require a substantial rewriting of the legislation. Appellants are, in effect, seeking to amend the Act through the judicial process in a manner that Congress rejected in the legislative process. Thus, the Court must reach and decide the constitutional question raised by appellants in this litigation.

II.

The essential defect in appellants' Establishment Clause argument is its factual underpinnings. Appellants seek to place this case in a procedural posture that bears no relationship to the course of litigation pursued by the parties. The purpose of that distortion is to urge this Court to disregard the extensive factual record developed in this case and to ground a rule of constitutional law on appellants' assumptions about church-related education in this country. But those assumptions find no support in the record of this case or in the realities of present day church-related education. In effect, appellants want to strip this case of its factual context and to obtain an advisory opinion on hypothetical and abstract questions.

The central concern of the Establishment Clause is that government be neutral in matters touching upon religion. While the constitutional goal is separation of church and state, absolute separation is neither required nor practical. The problem is necessarily one of degree, and the degree of separation demanded is

defined by the requirement of government neutrality. The principle of neutrality at once recognizes the inevitability of contacts and interaction between government and religion in modern society and reconciles the overlapping, and occasionally competing, dictates of the Establishment and Free Exercise Clauses.

The requirement of government neutrality in religious matters is fully implemented by the purpose and primary effect test enunciated in *Abington School Dist.* v. *Schempp,* 374 U.S. 203 (1963), and subsequently applied in *Board of Education* v. *Allen,* 392 U.S. 236 (1968), to the precise question of public financial assistance to church-related education. Under that test, a challenged statute will survive Establishment Clause scrutiny if it has a secular purpose and a primary effect that neither advances nor inhibits religion. A statute having the requisite purpose and primary effect will not fall simply because church-related institutions participate in its program and derive tangible benefits from it.

The decisions in *Allen* and *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), provide precise guidance for applying the purpose and primary effect test to public spending programs for education in which church-related schools participate. A challenged statute's purpose is to be adjudged according to any statement of legislative purpose it contains, and a statute's effects are to be evaluated according to their relationship to the stated purpose. The principal focus of the primary effect inquiry is the nature of the educational functions subsidized by public funds—not the religious or nonreligious nature of schools receiving those funds. If the government supports only the secular educational functions of participating church-related schools, the

statute will not have the primary effect of *advancing* religion. And if the statute's administrative scheme does not produce excessive or impermissible involvement with religion, the spending program will not have the primary effect of *inhibiting* religion.

Those governing constitutional principles lead inescapably to the conclusion that the Higher Education Facilities Act is in harmony with the Establishment Clause. The stated purpose is demonstrably secular. Funds received by church-related schools under the Act support only their secular educational functions. And the necessary administrative relationships between public officials and church-related schools are carefully tailored to assure a proper and constitutional use of public funds and to avoid government involvement in the religious functions of those schools. Consequently, the contested statute has a secular purpose and a primary effect that neither advances nor inhibits religion.

Appellants contend that the Establishment Clause imposes an absolute constitutional bar to any public assistance to so-called "sectarian" schools. They derive that supposed constitutional rule from a single sentence in *Everson* v. *Board of Education,* 330 U.S. 1 (1947). But the *Everson* language relied on by appellants was not intended by this Court as a definitive and final test of Establishment Clause limitations on government power. The prohibition on all aid to church-related institutions that appellants derive from *Everson* is in direct conflict with this Court's decision in *Bradfield* v. *Roberts,* 175 U.S. 291 (1899). Appellants also propose the "child benefit" theory as the limit of government power to aid church-related education. But that theory elevates the form of legislation over its substance and finds no support in the cases.

Appellants suggest that they can prevail under the purpose and primary effect test. Their argument however, is based on a misapplication of that test. They would have the Court adjudge the constitutionality of the challenged statute by examining the purpose and primary effect of *recipient schools.* But the cases clearly limit the Court's inquiry to the purpose and primary effect of *the statute.*

III.

Appellants further contend that the Higher Education Facilities Act violates the Free Exercise Clause because it amounts to "compulsory taxation for religious purposes." That contention is palpably lacking in merit. First, appellants have failed to show how the challenged statute coerces them in the exercise of their religious beliefs, a necessary factual predicate to a valid Free Exercise claim. Secondly, expenditures under the Act are for strictly secular purposes and there is no governmental action for religious purposes, as appellants claim.

ARGUMENT

I.

ISSUE OF STATUTORY CONSTRUCTION

Appellants' threshhold position is that Congress did not authorize the payment of federal funds to church-related[5] colleges and universities under the Higher

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[5] A problem of semantics runs throughout the appellants' brief in this Court. Appellants claim they are not seeking to disqualify all church-related colleges and universities from receiving federal funds. Rather they purport to be seeking a declaration only that certain "sectarian" educational institutions, as appellants define that term, should be denied participation in general public spending programs for education. But the distinction that appellants seek to draw between church-related and so-called "sectarian"

Education Facilities Act,[8] and the appellants urge this Court to construe the statute in that manner to avoid reaching the constitutional issues they have raised. Appellants invoke the salutary principle that, whenever possible, this Court should avoid ruling on the constitutionality of acts of Congress and should resolve disputes concerning such legislation through the device of statutory construction. However, neither the legislative history of the Higher Education Facilities Act nor the decisions of this Court will permit the statutory construction urged by appellants.

As appellants point out, the question of whether church-related colleges and universities should partici-

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institutions is illusory. As this brief will demonstrate, see pp. 22-25, *infra*, appellants' concept of a "sectarian" educational institution is so ill-defined and vague that administrative or judicial application of that concept will result in confusion and chaos whenever educational institutions which profess a church relationship seek federal funds under the challenged statute. *Cf. Flast* v. *Cohen*, 392 U.S. 83, 89-90 (1968). As a result, under the constitutional standard urged by appellants, any college or university claiming a church relationship will always be in doubt concerning its eligibility for public funds. For that reason, the appellee colleges and universities can find no meaningful distinction between the terms "sectarian" and church-related, and this brief, as did the court below, will refer to those institutions whose constitutional eligibility for public funds has been challenged by appellants as "church-related."

[8] The basis for appellants' statutory construction contention has shifted as the case has developed. In their complaint, appellants flatly asserted that Congress did not intend to include church-related colleges and universities within the class of eligible institutions. Complaint ¶ 25, J.A. 12, 33. At trial, appellants contended that Congress "sought to fudge the issue" of inclusion of church-related institutions and left the question for the courts to decide. Trial Transcript 9. Now appellants ask this Court to infer an exclusion of church-related colleges and universities from the statute's benefits because the statute does not expressly authorize their participation.

pate in a federal program of assistance to higher education was considered and debated at great length in Congress. Both the policy considerations[7] and the constitutional implications of that question were presented to the congressional committees which held hearings on the legislation[8] and were explored exhaustively in the ensuing floor debates.[9] Indeed, the issue of whether church-related schools should be included in federal education legislation long proved to be a stumbling block to the enactment of such legislation.[10]

Against that background, the floor debates that preceded enactment of the Higher Education Facilities Act are particularly illuminating on the question of whether the statute authorized grants to church-related institutions of higher education. Those who spoke during the debates—proponents and opponents in both the House and the Senate—uniformly assumed that the legisla-

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[7] Those policy considerations included whether limited federal funds for education should be allocated to private, as well as public, institutions and whether assistance to church-related institutions, even though constitutionally permissible, would be wise. How wisely Congress resolved those policy considerations is not at issue in this appeal. The issues before this Court are strictly limited to questions of constitutional power, or more accurately, the constitutional limitations imposed on the conceded power of Congress to tax and spend for the general welfare. This Court is not concerned with whether Congress acted wisely in resolving certain policy disputes which, under our tripartite national government, have been committed solely to Congress for resolution.

[8] See, *e.g.*, *Hearings on H.R. 3000*, *supra* note 1, at 91, 112-15 (testimony of Anthony J. Celebreeze, Secretary of Health, Education and Welfare); *id.* at 392-97 (testimony of Dr. Edgar Fuller).

[9] See, *e.g.*, 109 Cong. Rec. 14944-94, 19399-401, 19467-84 (1963).

[10] See, *e.g.*, L. Pfeffer, Church, State and Freedom 571-96 (2d ed. 1967); P. Kurland, *Politics and the Constitution: Federal Aid to Parochial Schools*, 1 Land & Water L. Rev. 475 (1966).

tion, as it emerged from the committees of both houses, authorized participation of church-related colleges and universities in the grant and loan programs. The issue that was debated was whether such authorization was wise and/or constitutional.[11] For those who doubted that the statute contained such authorization, a simple question was all that was necessary. Consider the following colloquy during the debate in the House of Representatives:

> "Mr. Poage. . . . I would like to ask the gentleman as to a question of fact because he is on the committee and has studied the bill. The bill does give authority to make grants to church-related institutions, does it not?
>
> "Mr. Quie. That is correct.
>
> "Mr. Poage. I thank the gentleman.
>
> "Mr. Quie. That is correct; any institution of higher education, whether it is private, nonchurch related, church related or public, can qualify if it provides for increases in enrollment and is needed and it is determined by the State commission it has the priority of needs so that it does qualify and that it will be able to build its facilities within that Federal share which cannot be more than one-third of the total cost and that its construction will be economical and that they do not want to use the building for purposes where the general public is charged admission, not for a gymnasium or recreational purposes or to be used for sectarian instruction or religious worship or a school of divinity. As I explained before, it had to fit into these criteria in order to qualify." 109 Cong. Rec. 14963 (1963).

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[11] See, *e.g.*, 109 Cong. Rec. 14945 (1963) (remarks of Rep. Anderson); *id.* at 14976 (remarks of Rep. Goodell); *id.* at 19467-77 (remarks of Senator Ervin); *id.* at 19879-80 (remarks of Senator Javits).

The committee chairmen and floor managers responsible for guiding the statute to enactment repeatedly defended the inclusion of church-related institutions as being consistent with constitutional limitations on congressional power.[12] Such defenses of the legislation would have been wholly unnecessary if grants of federal funds to church-related colleges and universities had not been authorized by the Act.

Finally, the Senate considered and defeated resoundingly two amendments offered by Senator Ervin to achieve the result appellants now seek—namely, the express exclusion from the statute's grant and loan program of all "church owned, controlled and operated colleges."[13] The debate on the Ervin amendments clearly reflects the Senate's awareness that church-related institutions would participate in the benefits of the statute as enacted.

The legislative history outlined above is directly relevant to appellants' statutory construction argument. For, when recourse to legislative history is necessary for purposes of statutory construction, this Court has consistently viewed the statements of an act's sponsors or promoters as valuable aids in construing the act. See, *e.g.*, *Galvan* v. *Press*, 347 U.S. 522, 526-28 (1954); *United States* v. *United Mine Workers*, 330 U.S. 258, 278-81 (1947); *Richbourg Motor Co.* v. *United States*, 281 U.S. 528, 536 (1930). The cases also hold that a statute cannot be construed in a manner that would achieve a result rejected by Congress by defeating amendments designed to achieve that result. See, *e.g.*,

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[12] See, *e.g.*, 109 Cong. Rec. 14954 (1963) (remarks of Rep. Powell); *id.* at 19218 (remarks of Senator Morse).

[13] 109 Cong. Rec. 19492-96 (1963).

Blau v. *Lehman*, 368 U.S. 403, 410-13 (1962); *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490, 508-09 (1945); see also *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 94 (1935).

Despite these established principles of construction, appellants continue to urge this Court to construe the Higher Education Facilities Act in a manner that would exclude church-related colleges and universities from the benefits of the Title I grant program. Recognizing that their argument flies in the face of the statute's legislative history, appellants can support their position only by noting that the statute contains no express authorization for grants to church-related institutions. But, as the court below noted, the limitations imposed by the Act on the uses that can be made of Title I facilities, see 20 U.S.C. § 751(a)(2), "make it plain that grants for construction of academic facilities ... [at] church-related colleges and universities were contemplated." J.A. 43.

Having debated at length whether church-related colleges and universities should participate in the statutory program and having decided in favor of such participation, Congress chose to define eligible institutions in a religiously neutral manner. 20 U.S.C. § 751(f). However, Congress carefully defined academic facilities eligible for federal financing to prevent any use of such facilities at chuch-related institutions for religious worship and sectarian instruction. 20 U.S.C. § 751(a)(2). In so writing the challenged statute, Congress sought to achieve a maximum expansion of academic facilities at the Nation's colleges and universities while scrupulously avoiding any use of federal funds to advance or inhibit religion. To require an express statutory authorization for inclusion of church-related

institutions is to quibble over the mechanics of legislative draftsmanship and to ignore the actual statutory scheme and its extensive legislative history.

Appellants also invoke the familiar rule that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score." *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1916). In view of the legislative history and express wording of the Higher Eductaion Facilities Act, however, appellants' proposed construction of the statute is not "fairly possible." As the Court observed in *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 379 (1933), after quoting the principle relied on by appellants: "[A]voidance of a difficulty will not be pressed to the point of disengenuous evasion."

More pertinent to this case is the settled principle that a statute cannot be construed to avoid constitutional issues if such construction would result in a "substantial rewriting" of the statute. *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964); *United States* v. *Robel*, 389 U.S. 258, 262 (1967). The best statement of that principle is found in *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 518 (1926):

> "We fully concede that it is the duty of a court in considering the validity of an act to give it such reasonable construction as can be reached to bring it within fundamental law. But it is very clear that amendment may not be substituted for construction and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation."

For this Court to construe the Higher Education Facilities Act to exclude so-called "sectarian" colleges and universities from the benefits of Title I would in-

deed be substituting amendment for construction. And the amendment that would be substituted would be one that Congress specifically declined to adopt. If, as a result of rejecting the statutory construction urged by appellants, this Court must reach and decide the constitutional question presented by appellants, the Court will merely be exercising its traditional and necessary judicial function. For the task of deciding constitutional questions is "inescapably" committed to this Court when those questions arise in the context of a proper case or controversy. *Trop* v. *Dulles,* 356 U.S. 86, 103-04 (1958). That task cannot be avoided by engaging in an exercise of legislative power under the guise of statutory construction.

II.

ESTABLISHMENT CLAUSE ISSUE

The essential legal dispute between appellants and appellees in this action can be simply stated. Appellants insist that the Establishment Clause validity of general public spending programs for education should be decided according to the religious or non-religious character of schools participating in such programs. The several appellees contend that the controlling question is whether the government has sought to aid and has in fact aided only secular educational functions, irrespective of the religious character of schools performing those functions.

Appellants derive the constitutional test they propose from a single sentence in one of this Court's decisions. They also urge that their proposed test be applied to an abstract and wholly hypothetical set of facts. This brief will examine the erroneous factual assumptions of appellants' argument, then trace the development of the controlling constitutional standard through this

Court's several Establishment Clause decisions, and finally demonstrate that appellants' proposed test conflicts with the decided cases and core Establishment Clause values.

A. Posture of the Controversy

The essential underpinnings of appellants' Establishment Clause argument are contained in six pages of their brief which purport to portray the posture of the present controversy. Appellants' Brief, pp. 6-11. In that portion of their argument, appellants place the case in a procedural posture that bears no resemblance to the course of litigation that brought the controversy to this Court. A more fundamental difficulty with appellants' argument is that it invites this Court to decide the important constitutional issues in the case as abstract and hypothetical questions.

Appellants assert that this controversy reaches the Court "in practical effect as a motion to dismiss." Appellants' Brief, p. 11. The proceedings in this case to date and the opinion and findings of fact entered by the court below belie that contention. Appellants' complaint contains the critical factual allegations that underlie their Establishment Clause argument—namely, that the appellee colleges and universities are "sectarian" institutions which are constitutionally ineligible to receive public funds. Complaint ¶¶ 12-16, 29; J.A. 10-11, 13. The answer filed by the appellee colleges and universities specifically denied those allegations. J.A. 16-18.[14] Appellants also undertook extensive pre-trial discovery. The appellee colleges and

[14] The answer of the Federal Government also denied those allegations. J.A. 21-22. The State of Connecticut pleaded lack of information and knowledge and insisted that appellants prove their allegations of sectarianism. J.A. 26-27.

universities were required to produce more than 200 documents, and the president of each of the appellee institutions was deposed. The trial of this action consumed four days. A total of 155 documents was placed in evidence, and the three-judge court heard testimony from twenty-two witnesses. Appellants presented only documentary evidence, and, through that evidence, they attempted to prove that the appellee institutions were "sectarian." The evidence of the appellee colleges and universities showed the non-religious use they made of their Title I facilities and established that they were not "sectarian" in the sense that appellants define that term.

The essential legal dispute that emerged from the trial was whether the Establishment Clause issue was to be decided according to the nature of the educational function subsidized by federal funds or according to the nature of the institutions receiving those funds. The court below agreed with the appellees that the nature of the educational function subsidized was controlling. See J.A. 49. As a consequence, the court below ultimately viewed appellants' evidence pertaining to the alleged sectarian nature of the appellee schools as irrelevant to the controlling constitutional test.[15]

The court below, however, did not disregard all of the evidence presented at trial. Its findings of fact relied heavily on evidence offered by appellants to show the regulatory scheme of the challenged statute[16]

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[15] Significantly, however, the District Court rebuffed all efforts by the appellee colleges and universities to exclude appellants' evidence concerning their alleged sectarian nature. Thus, with a few exceptions, all such proof offered by appellants is a part of the record of this case.

[16] PX 125, 126, 127.

and on the proof presented by the appellee schools to show that their Title I facilities would be used for non-religious purposes.[17] See J.A. 58-66. And those findings of fact were critical to the District Court's conclusion that the Higher Education Facilities Act, in its purpose and primary effect, neither advanced nor inhibited religion. No case could bear less resemblance to one disposed of on a motion to dismiss.

In attempting to depict this case in the posture of a motion to dismiss, appellants are really asking this Court to disregard the extensive factual record developed in the court below. It is understandable that appellants should now employ that tactic. Appellants specifically alleged that the appellee institutions were "sectarian" and, by their own concession, their proof at trial failed to establish that those schools are of such a character.[18] They try to mask that failing now by brushing aside the appellee schools as unimportant appendages to this litigation. Appellants' Brief, pp. 7-8.[19] But, in the process, appellants seek to deprive the case of its only valid factual context if the adversary process is to have any relevance to constitutional adjudication.

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[17] J.A. 101-21.

[18] The evidence presented at trial concerning the nature of the appellee institutions was reviewed fully by those schools in the proposed findings of fact that they submitted to the court below. That portion of those proposed findings is reprinted as an Appendix to this brief to summarize for the Court the evidence presented on that issue.

[19] Appellants have gone to extreme lengths to shift the attention of this Court away from the appellee colleges and universities. For example, the documentary evidence presented at trial included several catalogs of the appellee schools. Yet, when appellants wish to reinforce a point by quoting from a catalog of a church-related college, they use the catalog of Wheaton College in Illinois, which is no part of the record of this case. Appellants' Brief, pp. 39-40.

Appellants base their Establishment Clause argument not on the facts developed at trial about these four schools, but on a so-called "composite profile" [20] of a "sectarian" college. According to appellants, such a college is one

> "which admits only students of a particular religion, requires them to participate in religious activities, compels them to comply with the doctrines and dogmas of the religion, forces them to attend church, requires them under penalty of dismissal to take instruction in the theology and doctrines of religion, and does everything to propagate and advance a particular religion other than confer degrees in divinity . . . ." Appellants' Brief, pp. 10-11.

Conceding that no such institution is reflected in the record of this case, appellants nevertheless contend that "we have no doubt there are many such [sectarian colleges] throughout the nation," Appellants' Brief, p. 11.

It is true, as they assert, that appellants could have brought this suit in any state in the country. But one wonders why they did not, therefore, bring the action in a state or judicial district containing a college or university fitting their composite profile. Presumably when this case was filed appellants expected to be able to prove that the appellee colleges and universities matched that profile. But appellants, by their own concession, failed in that undertaking. What guarantee does the Court have, other than appellants' glib assurances, that they or others will be any more successful in the future in locating such a "sectarian" college or university? Until such proof is presented in the context of an adversary proceeding, the only proper

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[20] Appellants' Brief, p. 26.

assumption that this Court can make is that appellants' so-called "composite profile" of a "sectarian" college is a stereotype that exists only in appellants' fertile imagination.

For this Court to decide the important Establishment Clause issue in this case on the basis of appellants' "composite profile" would be to decide an abstract and hypothetical question.[21] In effect, appellants are asking this Court for an advisory opinion that, if there should be a college fitting their "composite profile," that instiution would be ineligible for public financial assistance.[22] The case and controversy doctrine of Article III prohibits such exercises of judicial power by this Court. In addition, by urging this Court to disregard the record of this case, appellants are seeking to strip it of the very factual context which the Court considers crucial to a proper resolution of important and difficult constitutional questions. See, *e.g., W. E. DuBois Clubs* v. *Clark,* 389 U.S. 309, 312 (1968).

A further difficulty with appellants' argument is that, while contending that a school may be constitutionally ineligible for public funds even if it has less than all of the elements of their "composite profile," Appellants' Brief, p. 11, they neglect to say how much less it may have. How, then, would they have this Court

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[21] Cases based on abstract and hypothetical questions raise serious problems of justiciability under Article III. See *Flast* v. *Cohen,* 392 U.S. 83, 99-100 (1968); *Aetna Life Insurance Co.* v. *Haworth,* 300 U.S. 227, 240 (1937).

[22] "[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." C. Wright, Federal Courts 34 (1963).

draw the parameters of sectarianism to guide judges, legislators and administrators of public aid programs in the future on this important public issue? Appellants do make reference to *Horace Mann League* v. *Board of Public Works,* 242 Md. 645, 220 A. 2d 51, *cert. denied, appeal dismissed,* 385 U.S. 97 (1966), as purporting to set down some criteria for determining whether colleges receiving state aid were "legally sectarian." However, as the court below noted, the reasoning and rationale of the *Horce Mann* decision are in direct conflict with this Court's Establishment Clause decisions.[23] J.A. 49, n. 14. Surely such a discredited case cannot be the vehicle for fashioning a rule of constitutional law.

Thus appellants ask this Court to create a rule of constitutional law in a factual vacuum and to devise criteria of sectarianism that bear no relationship to the dynamics and realities of church-related education in this country. Appellants' contention that the Establishment Clause issue in this case should be decided according to the alleged "sectarian" nature of schools receiving public funds is contrary to the weight of this Court's decisions. But even if that constitutional question is resolved as appellants urge, such a decision should be firmly rooted in a factual record developed through the adversary process and not on the basis of stereotypes and composite profiles which, for all the Court knows, exist only in the minds of appellants.

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[23] For an incisive critique of the *Horace Mann* decision, see R. Drinan, *Does State Aid to Church-Related Colleges Constitute an Establishment of Religion?—Reflections on the Maryland College Cases,* 1967 Utah L. Rev. 491.

B. Governing Constitutional Principles

In its most recent examination of the limitations imposed by the religion clauses of the First Amendment on governmental power, this Court observed:

> "The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute." *Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970).

The terse language of the Establishment Clause provides scant guidance for its application to specific governmental actions. However, in several leading decisions over the past 23 years, this Court has sketched in the contours of the Establishment Clause's restrictions on governmental power. To give form and substance to the Establishment Clause, those decisions have looked to the historical context in which the First Amendment was adopted and the modern societal values protected by the no-establishment guarantee.

The controlling constitutional standard has not emerged full-blown from any single decision of this Court. Rather, the test has evolved gradually as the Court has been required to apply the Establishment Clause prohibition to differing factual situations. Significantly, most of the leading decisions on this constitutional issue have involved the related problems of religion in the public schools[24] and public financial as-

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[24] *Abington School Dist.* v. *Schempp,* 374 U.S. 203 (1963); *Engel* v. *Vitale,* 370 U.S. 421 (1962); *Zorach* v. *Clauson,* 343 U.S. 306 (1952); *McCollum* v. *Board of Education,* 333 U.S. 203 (1948); see also *Epperson* v. *Arkansas,* 393 U.S. 97 (1968).

sistance to church-related education.[25] It is to that course of decisions that the Court must now look to resolve the constitutional questions raised by appellants.

1. Requirement of Government Neutrality

This Court has consistently recognized that, in Establishment Clause cases, the "constitutional standard is the separation of Church and State." *Zorach* v. *Clauson,* 343 U.S. 306, 314 (1952); *Board of Education* v. *Allen,* 392 U.S. 236, 242 (1968). However, the Court has also stressed that the Establishment Clause "does not say that in every and all respects there shall be a separation of Church and State." *Zorach* v. *Clauson, supra,* at 312; see *Walz* v. *Tax Commission,* 397 U.S. 664, 670 (1970). "The problem, like many problems in constitutional law, is one of degree," *Zorach* v. *Clauson, supra,* at 314; *Board of Education* v. *Allen, supra,* at 242, and the degree of separation demanded is defined by the requirement that government be neutral in matters touching upon the religious affairs of its people.[26]

The principle of neutrality recognizes that, while separation of church and state is the constitutional goal, total separation of those two institutions into wholly separate spheres of activity is simply not possible in

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[25] *Board of Education* v. *Allen,* 392 U.S. 236 (1968); *Everson* v. *Board of Education,* 330 U.S. 1 (1947).

[26] See, *e.g., Walz* v. *Tax Commission,* 397 U.S. 664, 669-70 (1970); *Board of Education* v. *Allen,* 392 U.S. 236, 242 (1968); *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 226 (1963); *Zorach* v. *Clauson,* 343 U.S. 306, 313-14 (1952); *Everson* v. *Board of Education,* 330 U.S. 1, 18 (1947).

today's society.[27] As this Court has acknowledged, "[t]he complexities of modern life inevitably produce some contact" between government and religious institutions. *Walz* v. *Tax Commission*, 397 U.S. 664, 676 (1970). Particularly in seeking answers to modern social problems, the activities and concerns of churches and government frequently overlap.

Churches and religious societies, along with other private groups, have long devoted generous amounts of time and energy to the problems of health, old-age security and education. Indeed, in the early years of this Nation, religious institutions and other private groups were virtually the only agencies in society engaged in those general welfare activities.[28] With the rapid growth of the welfare state in this century, government has assumed an increasingly larger role in seeking solutions to social problems. But the effect of

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[27] Some language in this Court's early Establishment Clause decisions tended to encourage those with more absolutist concepts of the requirement of church-state separation. See Hutchins, *The Future of the Wall* in The Wall Between Church and State 17 (D. Oaks ed. 1963). Absolutists took particular comfort in the Court's reliance on Thomas Jefferson's statement that the Establishment Clause was intended to erect "a wall of separation between Church and State." *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947); *McCollum* v. *Board of Education*, 333 U.S. 203, 212 (1948). However, the metaphorical wall, and its absolutist connotations, have assumed less prominence in later Establishment Clause decisions as the Court has made clear that the required separation is to be defined by the concept of neutrality. As the Court observed in *Walz* v. *Tax Commission*, 397 U.S. 664, 670 (1970), "[n]o perfect or absolute separation is really possible."

[28] D. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 513-516 (1968); W. Stanmeyer, *Free Exercise and the Wall: Obsolescence of a Metaphor*, 37 Geo. Wash. L. Rev. 223, 225-28 (1968).

that increasing governmental activity has not been to displace the beneficial services performed by churches and religious societies. Those institutions have continued to maintain schools, hospitals, orphanages and homes for the aged, as their resources have permitted.

The resultant contracts between governmental agencies and religious institutions have been many and varied. Church-related schools are required to satisfy government standards of curriculum content and quality. See *Board of Education* v. *Allen,* 392 U.S. 236, 245-46 (1968). Church-sponsored hospitals and homes must comply with government health and safety regulations. The government makes available to those religiously affiliated institutions services, such as fire and police protection, sewage disposal, and public streets and highways, which are available to the public generally. See *Everson* v. *Board of Education,* 330 U.S. 1, 17-18 (1947); *Walz* v. *Tax Commission,* 397 U.S. 664, 667 (1970). And, in some instances, government has chosen to work through established private social welfare agencies, including those with church relationships, to achieve its public welfare goals. In view of these necessary and inevitable interactions between church and state in modern society, the principle of neutrality assures a course of governmental conduct which neither advances nor inhibits religion while permitting religiously oriented activities to co-exist in the secular world.

The principle of neutrality also serves to reconcile the dictates of the Establishment Clause with the frequently overlapping, and occasionally competing, commands of the Free Exercise Clause of the First Amendment. See *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222 (1963). For example, if Congress had done

what appellants now demand and had extended the benefits of the Higher Education Facilities Act to all public and private institutions of higher education except those with church relationships, a serious free exercise problem would arise from the disqualification based on religious affiliation. See *Sherbert* v. *Verner,* 374 U.S. 398 (1963). That an Establishment Clause challenge can pose a threat to Free Exercise values was explicitly recognized by this Court in the *Everson* case. While acknowledging the limitations imposed on state power by the Establishment Clause, the Court noted that

> "other language of the [First Amendment] commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." 330 U.S. at 16. (Emphasis in Court's opinion.)

More recently, this Court stated:

> "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Walz* v. *Tax Commission,* 397 U.S. 664, 668-69 (1970).

Thus, the principle of neutrality seeks to minimize the potential conflicts between the two religion clauses of the First Amendment and to promote the goal of religious liberty which both clauses are designed to implement. The neutrality demanded of government by the Establishment Clause has been expressed in somewhat different language by the Court, but the limitations imposed on governmental power by the command of neutrality are not in dispute. Governmental actions must be such that "no religion be sponsored, none commanded, and none prohibited." *Walz* v. *Tax Commission,* 397 U.S. 664, 669 (1970). Government can take no action that either advances or inhibits religion. *Board of Education* v. *Allen,* 392 U.S. 236, 242-43 (1968); *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222 (1963).

> "Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz* v. *Tax Commission,* 397 U.S. 664, 669 (1970).

2. The Constitutional Test

From this Court's several Establishment Clause decisions, there has emerged a precise test for evaluating the constitutional validity of the interaction between government and religion in the realm of education. It is a test which fully implements the principle of neutrality and which places well-defined limitations on governmental actions. That test was first fully articulated in *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222 (1963), as follows:

> "The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion

> then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

Subsequently, the Court quoted that language of *Schempp* and applied the constitutional test it enunciated in *Board of Education* v. *Allen,* 392 U.S. 236, 243-44 (1968).

At issue in *Schempp* was the constitutionality of the practice of devotional Bible reading in the public schools. The Court ruled that such devotional exercises in public school classrooms had a purpose and primary effect that advanced religion. The appellants in *Allen* challenged on Establishment Clause grounds a New York statute that required local school boards to loan textbooks without charge to pupils in grades seven through twelve in both public and private schools, including those with religious affiliations. The Court concluded that the textbook loan program, in its purpose and primary effect, neither advanced nor inhibited religion.

The purpose and primary effect test, as first stated in *Schempp,* was neither a novel concept nor a departure from the Court's previous Establishment Clause declarations. For example, immediately before stating that test the Court referred to the cases in which "the Establishment Clause has been directly considered by this Court eight times in the past score of years." 374 U.S. at 222.[29] And the statement of the purpose and

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[29] See also *Walz* v. *Tax Commission,* 397 U.S. 664, 672 (1970), where, after citing with approval the application of the purpose and primary effect test in *Allen,* the majority commented: "In so holding the Court was heeding both its own prior decisions and our religious tradition."

primary effect test was immediately followed by citations to *Everson* v. *Board of Education,* 330 U.S. 1 (1947), and *McGowan* v. *Maryland,* 366 U.S. 420 (1961).

Everson was the first case in which this Court explored at length the dimensions of Establishment Clause limitations on governmental action. The precise question in *Everson* was whether a New Jersey statute which authorized the use of public funds to reimburse parents for the cost of public transportation to send their children to schools, including religiously affiliated schools, was a law respecting an establishment of religion. The Court found no conflict between the challenged statute and the Establishment Clause. The articulated rationale for the Court's decision was that New Jersey had done no more than enact general public welfare legislation that permitted children to travel safely and expeditiously to and from schools, including those with religious affiliations. 330 U.S. at 17-18. But this Court has subsequently recognized that "[t]he statute upheld in *Everson* would be considered a law having 'a secular legislative purpose and a primary effect that neither advances nor inhibits religion.'" *Board of Education* v. *Allen,* 392 U.S. 236, 243 (1968); see also *McGowan* v. *Maryland,* 366 U.S. 420, 443-44 (1961).

In *McCollum* v. *Board of Education,* 333 U.S. 203 (1948), the Court for the first time invalidated legislation because it conflicted with the Establishment Clause. At issue in *McCollum* was Illinois' "released time" program, under which public school students who desired to participate were released from their regular classes for thirty minutes a week to receive religious instruction on public school premises. The religious

instruction was given by individuals paid by various churches and religious groups in local communities. The Court ruled that the Illinois program conflicted with the Establishment Clause because that program amounted to "a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith." 333 U.S. at 210. Clearly, such a program had a purpose and a primary effect that advanced religion.

The purpose and primary effect test began to take shape in *McGowan* v. *Maryland,* 366 U.S. 420 (1961), when the Court ruled that Maryland's Sunday closing laws did not violate the Establishment Clause. In explaining the basis for that ruling, the Court said:

> "Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern [for the health, safety, recreation and general well-being of our citizens] wholly apart from their original purposes or connotations. The present *purpose and effect* of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals." 366 U.S. at 445 (Emphasis added.)

Subsequently, the Court struck down a provision of the Maryland Constitution that required all public officials to declare a belief in the existence of God. *Torcaso* v. *Watkins,* 367 U.S. 488 (1961). In the course of that decision, the Court stated:

> "There is, and can be, no dispute about the *purpose or effect* of the Maryland Declaration of Rights requirement before us—it sets up a religious test which was designed to and, if valid, does bar every person who refuses to declare a

> belief in God from holding a public 'office or profit or trust' in Maryland." 367 U.S. at 489-90 (Emphasis added.)

The challenged state constitutional provision was invalidated because, in its purpose and primary effect, it advanced religion.

Finally, the Court employed the purpose and effect analysis in its most recent Establishment Clause decision—*Walz* v. *Tax Commission,* 397 U.S. 664 (1970). There the Court ruled that states did not violate the Establishment Clause by exempting church property from taxation. The Court held that "[t]he legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion." 397 U.S. at 672. But its analysis did not end there, for the Court recognized that its prior decisions also required it to examine "the end result—the effect" of the challenged tax exemptions. 397 U.S. at 674. The exemption of church property from taxation was sustained only after the Court was satisfied that neither the purpose nor the effect of such exemptions conflicted with the Establishment Clause.

Thus, the purpose and primary effect test, as enunciated in *Schempp* and *Allen*, is the constitutional standard that governs the Establishment Clause issue in this litigation. It is a test which assures that government will maintain its required posture of neutrality in matters touching upon religion. It is a test which has emerged gradually but definitively as this Court has been required to apply the no-establishment limitation to differing factual situations. And it is the test which the Court applied in *Allen* to the precise question in this case—namely, whether the Es-

tablishment Clause prohibits the government from including church-related schools in general programs of aid to education.

3. Benefits to Religion

A challenged statute will not run afoul of the Establishment Clause merely because religion or religious institutions happen to derive benefits from it. That principle is a necessary corollary of the purpose and primary effect test. The formulation of the purpose and *primary* effect test necessarily presupposes that any governmental program will generate a number of effects. What is demanded by that test is that there be a primary effect that is secular. Once that requirement is satisfied, a challenged program will be considered to be consistent with the Establishment Clause, even though it also has the incidental effect of conferring certain tangible benefits on religion or religiously affiliated institutions.

Thus, in *Everson* v. *Board of Education,* 330 U.S. 1, 17 (1947), the Court upheld the New Jersey statute even though it recognized that "children are helped to get to church schools" and that "some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets." Similarly, in *Board of Education* v. *Allen,* 392 U.S. 236, 244 (1968), the Court acknowledged that "[p]erhaps free books make it more likely that some children choose to attend a sectarian school."[30] Surely a religiously affiliated

[30] In fact, when the Court cited the result in *Allen* with approval in *Walz* v. *Tax Commission,* 397 U.S. 664, 671-72 (1970), it did so despite its statement that the textbook loan law relieved churches sponsoring schools "of an enormous aggregate cost for those books."

school benefits and becomes a more viable institution when more children attend it as the result of a public spending program. See *Walz* v. *Tax Commission,* 397 U.S. 664, 670-72 (1970). But such an effect "does not alone demonstrate an unconstitutional degree of support for a religious institution." 392 U.S. at 244. Such an effect will not make the spending program constitutionally infirm as long as the program generates the required primary secular effect.

Tangible benefits have flowed to religion from other governmental programs sustained by this Court. For example, in *McGowan* v. *Maryland,* 366 U.S. 420 (1961), Sunday closing laws were upheld despite the benefits derived from them by religion, because they had the purpose and primary secular effect of providing a uniform day of rest and recreation for all citizens. 366 U.S. 442-45. Similarly, the exemption of church property from taxation was sustained even though the Court conceded that churches derive tangible economic benefits from such exemptions. *Walz* v. *Tax Commission,* 397 U.S. 664, 674 (1970).

When, as here, a governmental spending program for the improvement of education, health or the general welfare is attacked on Establishment Clause grounds, the incidental benefit corollary to the purpose and primary effect test simply recognizes the realities of our social order and implements the principle of neutrality. Such governmental programs typically seek to draw upon the experience and resources of all qualified public and private agencies to achieve the program's goals. Because of the prominent role traditionally played by church-related organizations in public welfare work, the exclusion of such organizations from governmental programs designed

to improve and expand those welfare services could properly be viewed as governmental hostility to religion.[31] Such an exclusion would also tend to frustrate the government in the achievement of legitimate secular goals.[32]

To be sure, allowing church-related organizations to participate in public welfare spending programs may enhance their capacity to provide various welfare services, such as a better education in the sciences. But, under the incidental benefit corollary, that fact is not decisive in resolving the Establishment Clause issue. The central inquiry, the focus of the purpose and primary effect test, remains whether a primary effect of the expenditures is the achievement of the program's legitimate secular goals.

4. Determining a Statute's Purpose and Primary Effect

The remaining problem is the basis for determining whether a challenged statute has a purpose and primary effect of advancing or inhibiting religion. The Establishment Clause issue in this case arises because church-related colleges and universities have been included in a major federal program designed to expand educational opportunities. This Court's decisions in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), provide precise guidance for applying the purpose and primary effect test to such a statutory scheme.

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[31] Government hostility toward religion is plainly forbidden by the Establishment Clause. See *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952); *McCollum* v. *Board of Education*, 333 U.S. 203, 211-12 (1948).

[32] See *Lemon* v. *Kurtzman*, 310 F. Supp. 35, 47 (E.D. Pa. 1969), *prob. juris. noted*, 397 U.S. 1034 (1970).

a. *Secular Purpose*

The *Allen* decision requires that a challenged statute's purpose be determined by reference to any statement of legislative purpose appearing on the face of the statute. For example, the Court noted that New York's textbook loan law was based on legislative "findings that the 'public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state.'" 392 U.S. at 239. Then, after stating the purpose and primary effect test as the controlling constitutional standard, the Court declared:

> "The express purpose of [the challenged statute] was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its *stated purpose.*" 392 U.S. at 243. (Emphasis added.)

The *Allen* decision did not fashion new law in focusing the inquiry on the statute's statement of purpose. For it has long been the rule that "the specific statement of primary purpose in the act governs." *Arizona* v. *California*, 283 U.S. 423, 456 (1931).

b. *Primary Secular Effect*

Whether a challenged statute has the requisite primary secular effect is complicated by the fact that a legislative enactment will invariably produce a multiplicity of effects, some of which are clearly secular and some of which may be characterized as religious. In the context of this case, the problem arises because federal funds have been expended to increase educa-

tional opportunities through the construction of secular academic facilities and because some of those funds have been awarded to church-related institutions of higher education. *Allen* establishes the basis for deciding whether such a statute *advances* religion and *Walz* sets forth the criteria for determining whether it *inhibits* religion. A principal focus of the inquiry is whether the primary effect of the contested expenditures is to be evaluated by examining *the secular or non-secular use made of the federal funds* or by examining *the secular or non-secular nature of the institutions* receiving those funds.

The Court in *Allen* placed substantial reliance on its earlier decision in *Everson* in upholding the New York textbook loan law. The appellants in *Allen* argued quite forcefully that *Everson* could not control because free bus rides are constitutionally distinguishable from free textbooks. The basis for the proffered distinction was that textbooks, unlike bus transportation, aid the educational process in church-related schools and that "[t]here is no such thing as secular education in a sectarian . . . school." Brief for Appellants, p. 16, *Board of Education* v. *Allen,* 392 U.S. 236 (1968). The Court found that argument unpersuasive, unsupported by the record in the case and at odds with its prior decisions.

The Court opened its review of those prior decisions by declaring that "this Court has long recognized that religious schools pursue two goals, religious instruction and secular education," 392 U.S. at 245; see also *Everson* v. *Board of Education,* 330 U.S. 1, 3 (1947), and concluded by asserting:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court

> decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. . . . Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education." 392 U.S. at 247-48.

The challenged New York statute was sustained because it authorized only the lending of secular textbooks to students, whether they attended public or religiously affiliated schools. 392 U.S. at 244-45. And the Court stressed that the textbook loan law did not result in "unconstitutional involvement of the state with religious instruction." 392 U.S. at 248.

Thus, the secular-religious dichotomy in the functions of religiously affiliated schools and the limitation of public assistance to the secular function was the precise focus of the Court's primary effect analysis in *Allen*. The contested statute was sustained because it subsidized only the secular educational functions performed by church-related schools and did not involve the government in the religious functions of those schools. That test of primary effect is wholly consistent with this Court's prior Establishment Clause decisions. In *McCollum* v. *Board of Education,* 333 U.S. 203 (1948), the Court invalidated Illinois' "released time" program because tax-supported property was subsidizing religious instruction. *Cf. Zorach* v. *Clauson,* 343 U.S. 306, 308-09 (1952). But, in

Everson v. *Board of Education*, 330 U.S. 1, 18 (1947), the Court agreed that church-related schools could share in those public benefits which are "so separate and so indisputably marked off from the religious function" performed by those schools. Consequently, the court below applied the proper test of primary effect when it ruled that "[t]he focus of this test as applied in *Allen* is the function, secular or religious, which the government aid subsidizes—not the nature of the institution, secular or religious, which receives the aid." J.A. 49.

Focusing on the educational function subsidized by public funds assures a full measure of protection for Establishment Clause values while not unnecessarily hampering government in its efforts to improve education generally and to expand educational opportunities. This Court observed in *Allen*:

> "Americans care about the quality of secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create." 392 U.S. at 247.

When government undertakes a general spending program for education, Establishment Clause values will be fully safeguarded if the funds allocated to schools with religious affiliations do not subsidize religious instruction or the other religious functions performed by those schools. At the same time, no Establishment Clause value is threatened when government seeks to aid secular education generally and, therefore, no Establishment Clause value is furthered by excluding

the significant number of students in religiously affiliated schools from the benefits of such aid.[33]

Excluding church-related schools from public spending programs for secular education simply because those schools have religious affiliations would also tend to frustrate the achievement of important legislative goals. When the Higher Education Facilities Act was being considered and debated, Congress was provided with statistics showing that, in the 1961-1962 academic year, there were a total of 2,040 institutions of higher education in the United States. Of that total, only 711 institutions were public. And, of the 1,329 private colleges and universities, 817 claimed church relationships.[34] Congress was told that state colleges and universities were rapidly approaching the limits of their expansion capacity[35] and that private colleges and universities had to be included in the proposed legislation if the burgeoning student population was to be accommodated.[36] Clearly, the manifestly secular goals of the Higher Education Facilities Act would have been frustrated if Congress had

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[33] The Court noted in the *Allen* decision that more than twenty-two per cent of New York students attended nonpublic schools. The comparable nationwide figure was placed at ten per cent. 392 U.S. at 248, n. 9. The great majority of nonpublic schools in this country are church-related. At the college level, 40 per cent of all institutions of higher education claim church relationships. *Hearing on H.R. 3000, supra* note 1, at 311.

[34] *Hearings on H.R. 3000, supra* note 1, at 311; 109 Cong. Rec. 19378 (1963) (remarks of Senator Morse).

[35] See, *e.g.*, *Hearings on H.R. 3000, supra* note 1, at 533-40 (statement and testimony of Dr. Mason W. Gross, President of Rutgers University).

[36] See, *e.g.*, *Hearings on H.R. 3000, supra* note 1, at 749, 753-54 (testimony of Dr. Fred H. Harrington, President of the University of Wisconsin).

been forced to eliminate 40 per cent of the Nation's colleges and universities—those with church relationships—from participation in the Higher Education Facilities Act.

The fact that government purports to aid only secular educational functions does not necessarily foreclose an Establishment Clause challenge to the validity of awarding public funds to church-related schools under general education legislation. In *Allen,* the Court was faced with a "meager record" containing nothing to refute the legislative and public judgment that church-related schools perform the dual functions of secular education and religious instruction. 392 U.S. at 248. The decision in *Allen,* however, clearly permits those challenging particular forms of aid to church-related education to show that, in fact, the public assistance is not confined to the secular educational functions of church-related schools. The challengers would presumably prevail if they could show that the publicly assisted secular functions of religiously affiliated schools are so permeated by religion that no meaningful distinction could be drawn between the secular and religious functions of participating church-related schools.[37] But, absent such a showing

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[37] See W. Valente, *Aid to Church Related Education—New Directions Without Dogma*, 55 Va. L. Rev. 579, 588-89 (1969); *cf.* J. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 Calif. L. Rev. 260, 291-303 (1968).

Proof of such a fusion of the secular and religious functions would stand on a far different legal footing from the unsubstantiated assertions of the appellants in *Allen* that permeation was a fact of the educational life of church-related schools. The appellants in *Allen* were, in effect, asking for a constitutional presumption of permeation. The Court rejected that presumption and firmly established the presumption of nonpermeation. But the Court did not foreclose the possibility of overcoming the presumption of nonpermeation by proof to the contrary.

of permeation, government can constitutionally extend financial assistance to the secular educational functions of church-related schools.

Thus, under *Allen,* a governmental spending program to assist education does not have the effect of advancing religion as long as it subsidizes only the secular educational functions performed by participating church-related schools. The further question whether such a program has the effect of inhibiting religion is governed by the *Walz* decision.

After satisfying itself that the contested property tax exemption did not have the purpose of "establishing, sponsoring, or supporting religion," the Court in *Walz* declared: "We must also be sure that the end result—the effect—is not an excessive government entanglement with religion." 397 U.S. at 674. The only and obvious alternative to exempting church property from taxation was to require that property be taxed. The Court concluded that the effect of exempting churches from taxation was "a lesser involvement than taxing them." 397 U.S. at 674-75.

The Court in *Walz* was not faced with any governmental program in which public funds flowed to church-related institutions. But, in the course of that decision, the Court observed:

> "[A] direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards. . . ." 397 U.S. at 675.

Thus, the Court apparently contemplated application of its test of government entanglement or involvement

to public spending programs that benefit, *inter alia*, church-related groups.[38]

The *Walz* decision indicates that government entanglement or involvement with religion carries the danger of governmental interference with religion that could lead to inhibition of religion. For example, in highlighting the evils inherent in taxing churches, the Court stated that such a practice would result in "tax valuation of church property, tax liens, tax foreclosures." 397 U.S. at 674. In addition, in commenting on the soundness of the *Allen* and *Everson* decisions, which validated public assistance to church-related education, the Court observed:

> "With all of the risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools, *we have been able to chart a course that preserved the autonomy and freedom of religious bodies* while avoiding any semblance of established religion." 397 U.S. at 672. (Emphasis added.)

Thus, the *Walz* test of government entaglement or involvement with religion is the basis for determining whether a public education program which benefits religiously affiliated schools has the prohibited effect of inhibiting religion.

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[38] The *Walz* language referring to direct money subsidies appears in that portion of the Court's opinion which discusses the alternatives of taxing or exempting from taxation churches *qua* churches. Thus, it would appear that the direct money subsidies discussed by the Court referred to such subsidies to churches *qua* churches. It is not clear that the dangers of "sustained and detailed administrative relationships" would be of the same kind or quality when public money flows to religiously affiliated organizations which are not engaged in strictly religious activities.

Walz does not bar all involvement, administrative or otherwise, between government and religious organizations. "The test is inescapably one of degree." 397 U.S. at 674. The Court recognized that "[e]ither course, taxation of churches or exemption, occasions some degree of involvement with religion." *Id.* Exemption was the preferred course of governmental conduct because it produced a "lesser" involvement. 397 U.S. at 674-75. Similarly, while recognizing that the necessary administrative relationships in government aid to the secular functions of church-related schools involved "risks," the Court did not view those relationships alone as constitutionally prohibited. 397 U.S. at 672. The Establishment Clause bars only "excessive" involvement between government and religion "calling for official and continuing surveillance *leading to an impermissible degree of entanglement.*" 397 U.S. at 675. (Emphasis added.)

The problem, therefore, is to determine which involvements between government and religion are "excessive" or "impermissible." The *Allen* decision resolves that problem when the Establishment Clause issue arises in the context of public assistance to church-related education. In sustaining the validity of government financial assistance to the secular educational functions of church-related schools, *Allen,* consistent with this Court's prior Establishment Clause decisions, requires that such government aid be strictly limited to those secular educational functions. Consequently, statutory and administrative schemes of such public assistance programs which do no more than assure that public funds are not spent for other than secular educational functions cannot be "excessive" or "impermissible."

The *Walz* decision recognized that most government grant programs contain comprehensive statutory and administrative schemes to assure compliance with statutory standards and requirements. 397 U.S. at 675. Such statutory and administrative schemes have the wholesome purpose and function of assuring a proper use of public funds and of seeking to secure the achievement of the program's goals. Typically, the statutory and administrative requirements are particularly stringent when government chooses to work through private organizations to achieve its goals.[39] Legislatures clearly have the right and the duty to impose stringent controls over the disbursement of tax funds. Taxpayers demand nothing less of their elected representatives.

Problems of impermissible and excessive government involvement with religion would be presented if the administrative controls placed on church-related schools were broader than necessary to assure a proper and purely secular use of government funds. The most serious of such problems would be any effort by public officials to regulate or interfere with the religious functions of church-related schools. Government cannot constitutionally support the religious functions of such schools. Neither can it seek to control or supervise those religious functions. Such governmental action would result in serious inhibition of religion and lead to the very form of government entanglement and involvement with religion that *Walz* declared to be excessive and impermissible. Indeed, such governmental

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[39] See, *e.g.*, Hill-Burton Act of 1964, 42 U.S.C. § 291; Mental Retardation Facilities and Mental Health Centers Act, 42 U.S.C. §§ 2261, 2281-88q; Economic Opportunity Act, 42 U.S.C. §§ 2701, 2711-68, 2941-80.

action would smack of an unconstitutional condition upon the availability of government funds. See *Speiser* v. *Randall*, 357 U.S. 513 (1958).

The final inquiry in the primary effect analysis is how to determine which of the several effects generated by a challenged statute is to be considered primary for Establishment Clause purposes. Here again the *Allen* decision guides the inquiry. In that case, the Court stressed that there was "nothing about the necesary effects of the statute that is contrary to its stated purposes." 392 U.S. at 243. Thus, a statute's effects are to be evaluated according to their relationship to the legislation's purposes. The concern is with whether the statute produces an effect consistent with its purposes. If there is such an effect, it will be deemed primary in the application of the purpose and primary effect test.

Such an analysis comports with reason and logic. When the legislature seeks to achieve certain secular goals, the judicial inquiry should be directed to whether the statute in its operative effects achieves those goals. To concentrate on effects unrelated to a statute's goals would be to disregard the central concerns of a legislature's efforts. Here, Congress having acted to aid secular education, the principal inquiry should be whether the statutory scheme has had that effect. If it has, that effect should necessarily be viewed as the primary impact of the legislation. To focus on the fact that church-related schools have derived benefits from the statute would emphasize an effect that has consistently been considered incidental to central Establishment Clause concerns. For, from *Everson* through *Walz*, this Court has repeatedly ruled that an otherwise valid legislative enactment will not be struck

down on Establishment Clause grounds because religion or religiously affiliated institutions benefit incidentally from the enactment.

Thus, when government undertakes to aid secular education generally, benefits derived by church-related schools from such a program will not have a primary effect that either advances or inhibits religion if only the secular educational functions of those schools are aided and if the administrative relationships created by the program are no more extensive than necessary to assure a proper and constitutional use of the public funds.

5. Applying the Governing Constitutional Principles

Applying the governing Establishment Clause principles outlined above to the facts of this case, there can be no doubt that the Higher Education Facilities Act passes constitutional muster.

Congress plainly stated the purpose of that statute in the legislative findings and declaration of policy that precede the Act's substantive provisions:

> "The Congress hereby finds that the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education. The Congress further finds and declares that these needs are so great and these steps so urgent that it is incumbent upon the Nation to take positive and immediate action to meet these needs through assistance to institutions of higher education, including graduate and undergraduate

institutions, junior and community colleges, and technical institutes, in providing certain academic facilities." 20 U.S.C. § 701

This Court need not look beyond that express statement of statutory purpose, although the court below correctly noted that the statutory findings had ample support in the evidence of the crisis in higher education presented to Congress. J.A. 48-49. The stated purpose of the challenged statute is patently and demonstrably secular. There is no mention of religion or religiously affiliated schools. The congressional concern was with safeguarding the national security and welfare by providing maximum educational opportunities for the growing number of Americans seeking the fullest possible development of their intellectual capabilities. The statutory purpose was to satisfy that urgent need by assisting institutions of higher education generally to expand their academic facilities sufficiently to accommodate the rapidly expanding student population. No statute could have a more obviously secular purpose. To suggest that the congressional findings and declaration of policy contain a religious purpose borders on frivolity.[40]

The Higher Education Facilities Act has also generated the required primary secular effect. Such an effect is conclusively demonstrated by the evidence presented at the trial of this action and by an examination of the statutory and administrative scheme of the enactment.

Institutions of higher education eligible for Title I grants are defined by the statute in religiously neu-

[40] Appellants make just such a suggestion in their brief. The faulty analysis that led appellants to that conclusion is examined at pp. 70-75, *infra*.

tral terms. Such institutions must be, *inter alia,* nonprofit, accredited and legally authorized to provide a program of education beyond high school. 20 U.S.C. § 751(f). Any college or university—public, private or church-related—which satisfies those criteria can qualify for a Title I grant if it can demonstrate that the planned academic facility

> "will, either alone or together with other construction to be undertaken within a reasonable time, (1) result in an urgently needed substantial expansion of the institution's student enrollment capacity, capacity to provide needed health care to students or personnel of the institution, or capacity to carry out extension and continuing education programs on the campus of such institution, or (2) in the case of a new institution of higher education, result in creating urgently needed enrollment capacity, capacity to provide needed health care to students or personnel of the institution, or capacity to carry out extension and continuing education programs on the campus of such institution." 20 U.S.C. § 716

Thus, the statutory goal of expanding educational opportunities generally is precisely implemented by the requirements imposed for eligibility for Title I grants.

The evidence at the trial of this action focused on how four colleges and universities in Connecticut contributed to the stated statutory goals. The statute requires that state agencies processing applications for Title I grants establish criteria for determining priorities among the applications submitted by colleges and universities in the state. 20 U.S.C. §§ 715, 717. Those criteria seek to assure that the limited federal funds available under Title I will produce a maximum increase in enrollment capacity. The Connecticut Com-

mission on Aid to Higher Education has complied with that statutory mandate, and the criteria it has established are religiously neutral. See Findings of Fact ¶ 20, J.A. 60; PX 1.[41] The appellee colleges and universities have consistently recorded high scores under those criteria, PX 2-8,[42] indicating that those schools are making major contributions to the achievement of the statute's secular goals. See Findings of Fact ¶ 31, J.A. 62.

The statute contains safeguards to assure that any Title I funds awarded to church-related colleges and universities will support only the secular educational functions of those schools. Specifically excluded from the definition of an eligible academic facility is any facility that will be used for "sectarian instruction" or "religious worship" or in connection with a school or department of divinity. 20 U.S.C. § 751(a)(2). That prohibition remains for the full twenty years that the federal government retains an interest in Title I facilities. 20 U.S.C. § 754. The prohibitions of 20 U.S.C. § 751(a)(2) are implemented by the requirement that each applicant for a Title I grant provide specific assurances that there will be no such prohibited use of a funded facility. Findings of Fact ¶ 18, J.A. 59. Each of the applications for Title I grants by the appellee colleges and universities contained such assurances. Findings of Fact ¶ 32, J.A. 63. In addi-

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[41] The designation "PX" refers to exhibits placed in evidence at trial by appellants.

[42] In fact, the appellee colleges and universities have generally scored higher than other institutions of higher education in Connecticut that appellants designated as constitutionally eligible to receive public funds in their complaint. Complaint ¶ 26, J.A. 13, 33.

tion, each of the appellee colleges and universities presented uncontroverted evidence at trial to show that its Title I facility or facilities were being used or would be used for solely secular purposes. J.A. 101-21.

The evidence of the appellee institutions went beyond the statutory restrictions on the use of their Title I facilities and directly confronted the issue of permeation. For example, appellee Fairfield University established that no religious limitations would be imposed on the content of courses taught in its new science building. Findings of Fact ¶ 40, J.A. 65. Similarly, appellees Fairfield University and Sacred Heart University showed that no religious restrictions were placed on books acquired for their federally funded libraries. Findings of Fact ¶¶ 35, 39, J.A. 63, 64. Appellants failed completely to produce any affirmative proof of permeation in connection with the five Title I facilities at issue, even though they indicated that such proof would be a part of their case.[43] As a consequence, the court below found that the five Title I grants received by the appellee institutions would support only the secular educational functions of those schools. Findings of Fact ¶¶ 26-42, J.A. 61-66.

Thus, both the provisions of the challenged statute and the proven results of awarding Title I grants to the appellee colleges and universities leave no doubt that the Higher Education Facilities Act subsidizes only the secular educational functions of participating church-related institutions of higher education. And the fact that the appellee institutions have demonstrated their ability to contribute to the statute's stated goals is proof that the primary effect of awarding Title

[43] See Trial Transcript 28-30.

I grants to church-related schools is to implement the congressional purpose in enacting the statute. Therefore, the primary effect of the Act is not to advance religion.

Whether the challenged statute's primary effect operates to inhibit religion requires an examination of the administrative relationships that result from granting federal funds to church-related colleges and universities.[44] The evidence presented at trial suggests that essentially "paper" relationships result from the administration of the Act.

The administrative process is triggered when a college or university applies for a Title I grant. All such applications require a specific assurance from the applicant that no part of a Title I facility will be used for "sectarian instruction" or "religious worship" or in connection with a school or department of divinity. Findings of Fact ¶ 18, J.A. 59.[45] The application itself and the instructions for completing the application emphasize the consequences of that assurance. J.A. 80. The state agency that administers the Title I program determines a particular school's eligibility solely on the basis of its written application and supporting documentation, J.A. 80-81, and further review by federal officials is also based solely on written submissions from the applicant and the state agency. J.A. 81-82. In effect, the state and federal officials responible for administering the statute rely on the

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[44] The regulations governing the administration of the Higher Education Facilities Act are found at 45 C.F.R. pt. 170 (1969).

[45] The application also demands a number of other assurances from the applicant. J.A. 87-88.

integrity of a church-related college that assures them there will be no religious use of a Title I facility.[46]

Successful applicants for Title I grants are notified on a "Grant Agreement" form which reiterates the institution's obligation to comply with all assurances contained in its application. J.A. 89. Thus, the institution's promise not to use a Title I facility for religious purposes becomes a contractual undertaking, and the institution's failure to comply with that undertaking leaves the government with all of the remedies available to an aggreived party in a breach of contract action. In addition, the federal government has undertaken a program of post-grant reviews of Title I facilities to assure itself that colleges and universities with such facilities are complying with all terms and conditions of their grants, including the requirement that such facilities not be used for religious purposes. The review consists principally of discussions with school officials and examination of course descriptions of subjects taught in Title I facilities. See J.A. 82.

Thus, the administration of the Higher Education Facilities Act is based on the assumption that a recipient of a Title I grant will comply with restrictions imposed on such a grant, once those restrictions are made known. That assumption of good faith fosters harmonious and limited relationships between public officials and church-related colleges and universities. There is no monitoring or surveillance of classroom activities. In fact, the Act specifically prohibits any

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[46] The evidence at trial, showing that the appellee institutions used their Title I facilities for solely non-religious purposes, demonstrates that the statute's administrators can safely rely on such assurances made by church-related schools.

federal control over "the personnel, curriculum, methods of instruction, or administration" of institutions receiving Title I grants. 20 U.S.C. § 757. More importantly, there is no involvement of public officials in the religious functions of church-related institutions. The interest of those officials is carefully limited to the uses made of specific, federally funded facilities.

An administrative relationship based on the assumption that the recipients of federal funds will comply with the law is consistent with this Court's decisions. For example, in the *Allen* decision the Court refused to assume that state officials "will not honestly discharge their duties under the law" to provide only secular textbooks to church-related schools. 392 U.S. at 245. Federal and state officials are equally entitled to assume that church-related colleges and universities will honor their promises not to use a Title I facility for religious purposes.

At the same time, those administering the challenged statute have been able to uncover a few cases in which there have been improper religious uses of Title I facilities and to resolve those problems harmoniously. See J.A. 82-84. In one of those cases, the misuse of the funded facility came to the attention of the Office of Education through a newspaper clipping. In another case, the misuse was discovered by another federal agency during a routine inspection. J.A. 82-83.

Neither the record in this case nor the overall regulatory scheme will support the conclusion that the necessary administrative relationships involved in awarding Title I grants to church-related schools will lead to excessive or impermissible involvement of govern-

ment with religion. The regulatory scheme is carefully tailored to assure only a proper and constitutional use of federal funds. No government involvement with the religious functions of church-related schools is required and none results. Consequently, the Higher Education Facilities Act does not have the effect, primary or otherwise, of inhibiting religion.

Thus, applying the governing constitutional principles to the facts of this case, the Higher Education Facilities Act has a purpose and primary effect that neither advance nor inhibit religion. As a result, the court below correctly concluded that appellants' Establishment Clause claims are without merit.

C. Appellants' Arguments

1. The So-Called Everson Test

Appellants' principal legal argument is based on the decision in *Everson* v. *Board of Education,* 330 U.S. 1 (1947), which appellants read as barring all public aid programs which "support" or "subsidize" religiously affiliated schools. They derive that rule of law from the following sentence in *Everson*:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 330 U.S. at 16.

This Court, referring to another sentence in the paragraph containing the "no tax" language quoted above, recently commented on "[t]he hazards of placing too much weight on a few words or phrases of the Court," *Walz* v. *Tax Commission,* 397 U.S. 664, 670 (1970).

Appellants' efforts to construct a constitutional test from that single sentence in *Everson* abundantly illustrate the "hazards" the Court perceived.

The essential difficulty with appellants' heavy reliance on the "no tax" language in *Everson* is that the Court neither intended to nor did it in fact postulate that sentence as a legal test to assess the validity of all public spending programs for education which benefit church-related education. The sentence containing the "no tax" language is one of several in *Everson* in which the Court attempted, in very broad and abstract language, to describe the general categories of problems which fall within the purview of the Establishment Clause. See 330 U.S. at 15-16. But that sentence was in no sense self-defining in the limitations it suggested that the Establishment Clause imposed upon government spending power.

The point is well illustrated by appellants' efforts to employ the decision in *Flast* v. *Cohen,* 392 U.S. 83 (1968), to support their substantive Establishment Clause argument. See Appellants' Brief, pp. 21-22. The Court in *Flast* held only that a federal taxpayer has standing, and therefore presents a justiciable controversy, when he challenges a federal spending program on Establishment Clause grounds. The Court pointedly stated that it was not passing on the merits of such an Establishment Clause issue. 392 U.S. at 106. Thus, the Court in *Flast* did no more than it did in the "no tax" language in *Everson.* In both instances, the Court was simply acknowledging that a colorable Establishment Clause issue arises from a public spending program which benefits church-

related education.[47] But in neither instance was the Court laying down a constitutional test for deciding that issue.

The principal defect of the "no tax" language of *Everson* as a test of constitutional validity is the imprecise and indefinite limitations it purports to impose on government power. That language requires further refinement and definition for application to specific public spending programs. For example, the "no tax" language seems to bar any aid to an institution that "teaches or practices religion." Read literally, the "no tax" language would preclude all public aid to any school, whether it be public or private, that offered any courses about religion or that made any provisions for religious exercises. But even appellants do not urge that literal reading of their so-called *Everson* test. Rather, they claim that the *Everson* prohibition extends only to those schools in which "the propagation, teaching or practice of religion is a meaningful or major part of [their] existence." Appellants' Brief, p. 9. However, standing alone, the "no tax" language provides no guidance to a court in making that determination.

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[47] It is for that reason that the appellee colleges and universities do not contend that the fact of an institution's church relationship is wholly irrelevant to such an Establishment Clause claim. No such claim could survive a facial challenge if no public funds flowed to church-related schools. Thus, if such a recipient institution were to deny any church relationship, the moving party would be entitled to establish the church relationship through proof. However, no such problem existed in this case because each of the appellee schools, through stipulations of fact, admitted their church relationships. Once the fact of a church relationship is established, the Establishment Clause inquiry is limited to the nature of the educational function subsidized by the public funds.

Even the word "support" in appellants' *Everson* test is of uncertain meaning. For example, in *Board of Education* v. *Allen,* 392 U.S. 236, 244 (1968), the Court ruled that the New York textbook loan law did not amount to "an *unconstitutional degree of support* for religious institutions." (Emphasis added.) That explicit ruling was necessarily implicit in the holdings in both *Everson* and *Allen* sustaining public spending programs that conferred tangible and significant benefits on religiously affiliated schools. For example, in *Walz* v. *Tax Commission,* 397 U.S. 664, 671-72 (1970), the Court cited *Allen* with approval even though it stated that the textbook loan program "relieved those churches [sponsoring schools] of an enormous aggregate cost for those books."

Since the "no tax" language of *Everson* does not define what constitutes an unconstitutional degree of support for religious institutions, the Court must look elsewhere for the test of permissible public support for such institutions. And the test prescribed by the Court's opinions is the purpose and primary effect test enunciated and applied in *Schempp* and *Allen.*[48] If

[48] Appellants claim to find support for their *Everson* test in the fact that this Court has quoted the "no tax" language in several Establishment Clause decisions. But the decisions that have quoted the "no tax" language have in no sense adopted that language as a constitutional test. For example, the "no tax" language is quoted in part in the *Allen* decision. 392 U.S. at 242. But, on the following page, the Court quoted in full that portion of the *Schempp* decision which articulated the purpose and primary effect test and then followed that quotation with the observation that "[t]his test is not easy to apply." 392 U.S. at 243. The Court certainly would not have identified the purpose and primary effect language of *Schempp* as the test it was applying if it had viewed the "no tax" language of *Everson* as the controlling constitutional standard.

a public spending program for education does not have a purpose and primary effect that either advances or inhibits religion, it will not result in an unconstitutional degree of support for participating religiously affiliated schools.

2. Bradfield v. Roberts

The complete answer to appellants' so-called *Everson* test is this Court's decision in *Bradfield* v. *Roberts*, 175 U.S. 291 (1899). That decision demonstrates that, despite appellants' elaborate arguments to the contrary, there is no absolute constitutional bar to public support for church-related institutions. In addition, *Bradfield* provides the precise basis for determining whether an institution is "sectarian," if that determination is considered relevant to the Establishment Clause issue in this case.

The appellant in *Bradfield* challenged a grant of federal funds to Providence Hospital in the District of Columbia. The appellant alleged in his complaint that the hospital was operated by "members of a monastic order or sisterhood of the Roman Catholic Church, and is conducted under the auspices of said church." 175 U.S. at 292. The appellant further alleged that, because of the "sectarian character of . . . Providence Hospital," any grant of federal funds to that institution would be "contrary to the article of the Constitution which declares that Congress shall make no law respecting a religious establishment." 175 U.S. at 293. This Court found no merit in the appellant's constitutional claim, holding that the hospital took its legal character from its act of incorporation and that, under its act of incorporation, the hospital was purely a secular institution. The Court's opinion leaves no doubt

that it viewed as wholly immaterial the facts upon which the appellant alleged that the hospital was a "sectarian" institution.[49]

> "Assuming that the hospital is a private eleemosynary corporation, the fact that its members, according to the belief of the complainant, are members of a monastic order or sisterhood of the Roman Catholic Church, and the further fact that the hospital is conducted under the auspices of said church, are wholly immaterial. . . . The facts above stated do not in the least change the legal character of the hospital, or make a religious corporation out of a purely secular one as constituted by the law of its being. Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into. Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church. To be conducted under the auspices is to be conducted under the influence or patronage of that church. The meaning of the allegation is that the church exercises great and perhaps controlling influence over the management of the hospital. It must, however, be managed pursuant to the law of its being. That the influence of any particular church may be powerful over the members of a nonsectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into

[49] Throughout this litigation, appellants have argued that those same facts should be considered in determining whether the appellee colleges and universities are sectarian.

> a religious or sectarian body. That fact does not alter the legal character of the corporation, which is incorporated under an act of Congress, and its powers, duties, and character are to be solely measured by the charter under which it alone has any legal existence." 175 U.S. at 297-98.

Thus, as long as an institution was created as a secular corporation and is being "managed pursuant to the law of its being," 175 U.S. at 298, even an intense relationship between that institution and a religious body will not make it constitutionally ineligible for public funds.

Apparently recognizing the fatal impact of *Bradfield* on their central legal theory, appellants suggest that educational institutions stand on a different constitutional footing from hospitals. That suggested distinction finds no support in this Court's decisions.[50]

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[50] Appellants urge their distinction between hospitals and educational institutions, in part, because the Court in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), did not rely on *Bradfield*. There is a similar omission in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), which is the only other decision of this Court to consider the constitutional validity of public aid to church-related education. However, the Court's failure to rely on *Bradfield* in *Everson* and *Allen* cannot be read as holding *Bradfield* inapplicable to educational institutions because the records in both *Everson* and *Allen* would not support an application of *Bradfield*. For *Bradfield* to be applicable, the church-related institution in question must have been incorporated under a state or federal secular incorporation law. The records in *Everson* and *Allen* contained no evidence that the parochial schools benefitting from the challenged programs were so incorporated. Because Catholic elementary and secondary schools—unlike Catholic colleges and universities—are typically affiliated with and operated by a parish or diocese, there is a strong probability that the schools involved in *Everson* and *Allen* were not separately incorporated as secular institutions. That is not true of the appellee colleges and universities in this case. Thus, the only proper conclusion that can be drawn from the Court's failure to rely on *Bradfield* in *Everson* and *Allen* is that *Bradfield* probably did not apply to the facts of those cases.

In fact, one decision has applied *Bradfield* to the precise question of whether a church-related school—Georgetown University—was a "sectarian" institution. *Speer* v. *Colbert,* 200 U.S. 130 (1906). Georgetown University was at that time, as it is today, operated under the auspices of members of the Society of Jesus, a religious order in the Roman Catholic Church.[51] The Court ruled that Georgetown University

> "was fully and completely incorporated by the above-cited act of Congress of June 10, 1844. *That act must be resorted to as the measure of the powers and duties, as well as to define the character, of the corporation created thereby. Bradfield* v. *Roberts,* 175 U.S. 291. *Taking the character of the college from the act of Congress, we are of the opinion that it is not a sectarian institution. . . .*" 200 U.S. at 143. (Emphasis added.)

It is clear, therefore, that *Bradfield* applies when the issue is—as stated in appellants' brief—whether an educational institution is to be deemed "sectarian" for Establishment Clause purposes.[52]

The inquiry mandated by *Bradfield* differs significantly from the tests of sectarianism proposed by

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[51] Appellee Fairfield University has an identical relationship to the Jesuit Order.

[52] Appellants also seek to distinguish *Bradfield* because the Court in that case stated that Providence Hospital did not limit its services to members of a single religious denomination. Appellants' Brief, p. 26. Appellants' assertion that church-related schools are not similarly open to persons of all religious faiths finds no support in the record of this case. Each of the appellee colleges and universities demonstrated affirmatively through evidence that they impose no religious restrictions on admission to the student body or employment on the faculty and staff. Appellants' contrary assertion is based solely on their so-called "composite profile" of a hypothetical "sectarian" college.

appellants.[53] Appellants have framed the basic factual issue in this case in terms of whether schools receiving Title I grants are religious institutions or are not religious institutions. *Bradfield* compels a far different emphasis. The underlying premise of *Bradfield* is that, when a religiously affiliated organization obtains a charter from the state to operate a hospital or a school, the law presumes it will carry out that activity in the same manner as non-church-related organizations which receive similar charters for identical purposes. Thus, in the context of this case, the search for "sectarianism" should be limited to determining whether church-related schools receiving Title I grants are fulfilling the educational functions for which they have been chartered in the states where they are located. If so, such schools will be considered bona fide educational institutions and not sectarian institutions as appellants allege. In a very real sense, therefore, the inquiry under *Bradfield* is "whether the educational function [of a church-related school] is distorted because of the institution's religious commitment."[54]

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[53] Appellants' brief does not make clear the precise test of sectarianism that they are advocating. Appellants seem to rely principally on their "composite profile" of a sectarian college. Appellants' Brief, pp. 10-11. But appellants also appear to be urging this Court to apply the criteria of sectarianism employed by the Maryland Court of Appeals in *Horace Mann League* v. *Board of Public Works*, 242 Md. 645, 220 A.2d 51, *cert. denied, appeal dismissed*, 385 U.S. 97 (1966). In the court below, however, appellants relied exclusively on the *Horace Mann* criteria in developing their central legal theory.

[54] D. Giannella, *supra* note 20, at 588. The appellee colleges and universities suggested to the court below three factors that would reveal whether a church-related college's religious commitment distorted its educational functions. Those factors were (1) whether the school is accredited, (2) whether the school is open to persons of all religious faiths, or of no religious faith, and (3) whether

Consequently, *Bradfield* is the controlling precedent if the Court accepts appellants' invitation to decide the Establishment Clause issue in this case according to the alleged sectarian character of colleges and universities receiving Title I grants. And the evidence presented at the trial of this action established that none of the appellee colleges and universities are "sectarian" within the meaning of *Bradfield*.[55]

3. Child Benefit Theory

The *Everson* test propounded by appellants is absolutist in the prohibitions it imposes on government aid to church-related education. But the holdings in both *Everson* and *Allen,* are incompatible with any such absolute prohibitions, since both cases sustained spending programs that conferred tangible benefits on church-related education. Appellants, therefore, attempt to reconcile their *Everson* test with the holdings in *Everson* and *Allen* by recourse to the so-called "child-benefit" theory. See Appellants' Brief, pp. 19-20.

According to its proponents, the child-benefit theory marks the constitutional bounds imposed by the Estab-

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the school affords its students and faculty a full measure of academic freedom. The evidence at trial conclusively established that the appellee institutions were fully acquitting their educational functions under those criteria. See App. ¶¶ 33, 34, 37, 38, 41, 42, 45, 46, 49, 50, 53, 54, 58, 59, 62, 63, *infra*.

[55] All four appellee institutions have been incorporated as nonprofit, educational institutions, each by special act of the Connecticut Legislature under the authority of that State's general law governing nonstock corporations. Conn. Gen. Stat. Ann. tit. 32, ch. 600. See App. ¶¶ 32, 40, 48, 57, *infra*. Significantly, the appellee institutions were not incorporated under the special provisions of Connecticut law for ecclesiastical societies and church corporations. See Conn. Gen. Stat. Ann. tit. 32, ch. 598.

lishment Clause on public spending programs for education by reference to the recipient of the public funds. If the aid goes directly to the school child or his parents, the program will survive a constitutional challenge. But, if the public funds flow directly to a church-related school, the program is constitutionally defective under the child-benefit theory.[56] The child-benefit theory grows out of some language in both the *Everson* and *Allen* decisions. In *Everson,* the Court observed that "[t]he State contributes no money to the schools" under the challenged legislation "which does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." 330 U.S. at 18. In *Allen,* the Court stated that "no funds . . . are furnished to parochial schools." 392 U.S. at 243-44.

The federal spending scheme challenged in this case permits the government to make grants directly to church-related institutions of higher education. Thus, if the child-benefit theory is the measure of constitutional validity under the Establishment Clause, appellants must prevail in this case. But this Court's decisions, combined with a respect for Establishment Clause values, compel the conclusion that the child-benefit theory in no sense defines Establishment Clause limitations on permissible public assistance to the secular functions of church-related schools.

The child-benefit connotations of both *Everson* and *Allen* are explained quite simply by the legislative

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[56] See, *e.g.*, G. LaNoue, Public Funds for Parochial Schools? 15-22 (National Council of Churches, 1963); H. Jones, *The Constitutional Status of Public Funds for Church-Related Schools,* 6 J. Church & State 61 (1964).

schemes the Court was reviewing in those cases. In each instance, the legislature had structured the challenged program so that its financial benefits did in fact flow directly to the school child or his parents. Thus, in stating in both cases that no public funds were furnished to church-related schools, the Court was doing no more than reciting the facts of the cases it was deciding. To read those statements as articulating a rule of law that no public funds can be given directly to church-related schools is to attribute to the Court two exercises of judicial power it has repeatedly disclaimed. First, the Court would be deciding a question not presented by *Everson* and *Allen*, since in neither case did public funds flow directly to church-related schools. Secondly, the Court would be overruling *sub silentio* its earlier decision in *Bradfield* v. *Roberts*, 175 U.S. 291 (1899), in which a direct federal grant to a church-related institution was sustained.

The child-benefit theory also ignores the essential rationale for the *Allen* decision. For, after stating rather cryptically that no funds were furnished to church-related schools, the Court examined at length the dual nature of the education provided by church-related schools. 392 U.S. at 245-48. If the Court was concerned only with whether public funds flowed to the school child rather than the school, its lengthy analysis of the type of education provided by church-related schools was wholly unnecessary once the Court found that the statutory benefits flowed to school children and their parents.[57] The Court examined the educational program of church-related schools because it was the nature of the educational function sub-

[57] See W. Valente, *supra* note 27, at 593.

sidized—and not the identity of the recipient of the public funds—that was constitutionally controlling.

Perhaps the most serious defect in the child-benefit theory is the threat it poses to Establishment Clause values.[58] The child-benefit theory elevates the form of legislation over its substance and, in so doing, would permit a legislature to achieve what the Establishment Clause forbids. The logic of the child-benefit theory would compel the validation of a program providing full tuition from public funds for students attending church-related schools. But such a full tuition grant to those students would mean that tax-raised funds would subsidize the religious, as well as the secular, aspects of the curricula of church-related schools. However, *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), prohibits such tax support for religious instruction. The purpose and primary effect test, which limits public support to the secular educational functions of church-related schools, averts such a conflict with Establishment Clause values.

Consequently, the court below properly disposed of appellants' child-benefit argument when it commented: "[T]he child-benefit or indirect-direct aid approach would fashion an unacceptable test based on form rather than substance inasmuch as the 'constitutional result would depend upon minute distinctions and technicalities.'" J.A. 47. And the resultant "minute distinctions and technicalities" would do little to protect core Establishment Clause values.

4. Appellants' Version of the Purpose and Primary Effect Test

Appellants grudgingly concede that the purpose and primary effect test of *Schempp* and *Allen* might have

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[58] See J. Choper, *supra* note 27, at 313-18, 321.

a bearing on this litigation.[59] However, appellants then proceed to distort and misapply that controlling constitutional standard. There are two essential and demonstrable fallacies in appellants' purpose and primary effect analysis.

The first and probably most basic fallacy in that analysis is appellants' suggestion that the purpose and effect of a challenged enactment should be measured by the purpose and effect of institutions which benefit from it. That suggestion is simply in direct conflict with the precise formulation of the purpose and primary effect test. For, in both *Schempp* and *Allen*, the Court enunciated the test as follows: "[W]hat are the purpose and the primary effect *of the enactment*?" 392 U.S. at 243; 374 U.S. at 222 (emphasis supplied). The judicial concern is clearly with the purpose of the *legislature* and the primary effect of the *legislature's* actions. The educational processes in particular schools which benefit from such an enactment are simply an incidental facet of the central inquiry into legislative purpose and effect. Thus, a judicial inquiry that concentrated on the purpose and primary effect of those schools and their educational processes would clearly be misdirected.

Such a judicial inquiry would also be unworkable and unmanageable. For that inquiry would necessarily

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[59] Appellants misstate the position of the court below when they refer to the District Court's "assumption that the *Everson* test has been superseded by *Schempp*." Appellants' Brief, p. 30. The court below made no such assumption. That court simply recognized that *Everson's* "no tax" language did not state a constitutional test and that the controlling constitutional standard was contained in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), which applied the purpose and primary effect test to the precise question of public financial assistance to the secular functions of church-related schools. J.A. 44-51.

assume that the legislature was obligated to examine the purpose and effect of all schools that might participate in a spending program and to designate as qualified only those which, in their educational processes, did not advance or inhibit religion by design or result. Such a legislative inquiry would not be limited to church-related schools, for appellants' theory would also disqualify any school that *inhibited* religion. Since the effect of a school's educational process can be measured only according to the students it graduates, a legislature presumably could not act until it polled the graduates of all schools, church-related or otherwise, to determine whether the religious faith of those graduates had been strengthened or weakened by attendance at a particular school. The legislature would also have to satisfy itself that no participating school did anything in its curriculum or program to encourage or discourage religion. Simply to state these necessary by-products of appellants' purpose and primary effect analysis is to reveal the absurdity of that analysis.

Appellants' brief provides a more concrete demonstration of the clearly misdirected inquiry their analysis produces. Appellants attribute to Congress the impermissible purpose of advancing religion because, under the Higher Education Facilities Act, federal funds flow to institutions whose "dominant purpose . . . is to advance religion through propagation." Appellants' Brief, p. 33. But Congress did not manifest, in either the statute itself or the legislative background to the statute, any intent to aid church-related institutions because they are church-related. The manifested purpose is to expand enrollment capacity generally and as rapidly as possible by grants to qualified institutions which could most quickly and effectively provide for such expansion. Church-related institutions partici-

pate in the grant program only if (1) they satisfy religiously neutral eligibility requirements, (2) they demonstrate that the grant will result in an urgently needed expansion of enrollment capacity, and (3) they use the grant for solely secular purposes. It takes a fertile imagination to find a religious purpose in the provisions of the Higher Education Facilities Act or in the proceedings that led to its enactment.

The second fallacy of appellants' purpose and primary effect analysis is its factual predicates. In purporting to describe the purpose and effects of the educational processes of church-related colleges, appellants resort repeatedly to those characteristics of a so-called "sectarian" college contained in their "composite profile." As already shown, pp. 22-25, *supra*, that "composite profile" has absolutely no basis in the record of this case and bears no relationship to the dynamics and realities of church-related education. Yet appellants would have this Court apply the purpose and primary effect test on the basis of their own unsupported and unsupportable assumptions about church-related education.

A few examples will suffice. Appellants attribute an impermissible religious purpose to the Higher Education Facilities Act because funds under the statute go to schools whose "dominant purpose . . . is to advance religion through propagation." Appellants' Brief, p. 33. The evidence in this case, however, refutes any suggestion that the appellee colleges and universities exist for the purpose—dominant or otherwise—of *propagating* religion. Those institutions are not unique in that respect. For church-related colleges and universities are first and foremost educational institutions. Their church relationships simply add a

religious dimension of varying degrees to their total educational program.[60]

Appellants also make reference to "those churches which at great expense maintain sectarian colleges." Appellants' Brief, p. 33. But the record in this case fails to reveal any significant financial contribution by the sponsoring church—let alone any great expense by that church—to the appellee colleges and universities. One study of church-related higher education in this country found that, of 817 institutions surveyed, 26.2 per cent derived no income from the sponsoring church and 58 per cent received less than 10 per cent of their educational and general income from that source.[61] A rule of constitutional law based on the assumption that churches go to great expense to maintain colleges and universities would surely be ill-founded.

Finally, appellants assert that church-related schools "were organized and operated in pursuance of the church's religious endeavors; the teaching mission of the church refers to religious, not secular teaching." Appellants' Brief, p. 36.[62] That assertion is just a

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[60] See M. Pattillo and D. Mackenzie, Church-Sponsored Higher Education in the United States 76-101 (1966). Significantly, the authors concluded that the institutions they studied "are, by and large, stronger academically (in the secular sense) than they are religiously." *Id.* at 100.

[61] M. Pattillo and D. Mackenzie, *supra* note 60, at 43-47.

[62] The word "church" in the words quoted above seems to assume a monolithic force that pervades all of church-related education in this country. But the church-related colleges and universities in this country are affiliated with more than sixty different religious bodies. And those many sponsoring religious bodies reflect the great diversity of thought and belief that characterizes American religious life. See M. Pattillo and D. Mackenzie, *supra* note 60, at 20-26.

restatement of their plea to this Court to obliterate the distinction between secular education and religious instruction in church-related schools, a plea rejected in *Board of Education* v. *Allen,* 392 U.S. 236, 245-48 (1968). And the record in this case proves beyond all doubt that church-related educational institutions do in fact perform the separate and distinct functions of secular education and religious instruction.

Thus, unless the Court is willing to ground a constitutional principle on appellants' unsupported assumptions or to decide a hypothetical question, it could not rule for appellants even if it accepted their invitation to adjudge the validity of the Higher Education Facilities Act according to the purpose and effect of institutions receiving Title I grants.

5. Appellants' Application of the Walz Decision

Appellants read this Court's decision in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), as imposing an absolute Establishment Clause bar to any public spending program for education which results in "detailed" and "sustained" administrative relationships between public officials and church-related schools. *Walz* can be so read only if its reasoning is disregarded. For the Court expressly stated that the test of impermissible government involvement with religion "is inescapably one of degree." 397 U.S. at 674. It is only those administrative relationships that promote excessive or impermissible entanglement or involvement with religion and thus lead to governmental inhibition of religion, that are barred.

Appellants, however, eschew analysis, calling any administrative relationship the basis for invalidating the Higher Education Facilities Act. Such an argument

necessarily ignores the broad involvement of government in private education, including the church-related segment, that exists independent of public aid programs. The clearest examples involve compulsory attendance laws that impose strict requirements of curriculum content and quality on church-related elementary and secondary schools. This Court has found no constitutional defects in those laws despite the extensive government involvement with church-related education that results. See *Board of Education* v. *Allen*, 392 U.S. 236, 245-47 (1968); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925). Similar involvement between the state and church-related institutions exists in higher education. For example, under Connecticut law, the appellee colleges and universities could not offer a program of higher education or grant degrees until they were licensed and accredited by the State. Conn. Gen. Stat. Ann. § 10-330. The licensing and accrediting procedure involves close examination of an institution's "administration, finance, faculty, curricula, library, student admission and graduation, plant and equipment, records, catalogs, [and] program announcements." Conn. Gen. Stat. Ann. § 10-330(b). There have been no known challenges to those or similar state programs on Establishment Clause grounds. Yet they lead to a far greater governmental involvement with church-related educational institutions than the administration of the Higher Education Facilities Act.

Appellants' *Walz* argument contains the seeds of its own refutation. Appellants twice state that what *Walz* prohibits is "state involvement in *church* affairs." Appellants' Brief, pp. 41, 43. (Emphasis added.) But the federal and state officials responsible for administering the Act deal with educational insti-

tutions, not churches. Their concern is with educational activities, not church affairs. A school's church relationship does not convert that school into a church. Thus, the very forms of government involvement that appellants claim to be constitutionally disabling are lacking in this case.

Appellants also claim that the challenged statute will require public officials to police and monitor the classrooms of church-related schools. Appellants' Brief, pp. 42-43. No such requirement is imposed by the Higher Education Facilities Act, and the evidence presented at the trial of this action showed that no such monitoring or policing has resulted. In fact, such administrative action would appear to be precluded by the express terms of the statute. See 20 U.S.C. § 757. Rather, as this brief has shown, the administration of the Act rests on assurances from schools receiving Title I grants that they will make a solely secular use of the federal funds and the sound assumption that the schools will comply with those assurances. The administrative processes under the Act are carefully tailored to achieve a limited result—the use of federal funds for solely secular purposes.[63]

The involvement which *Walz* prohibits is that which leads to an inhibition of religion. Appellants have failed to demonstrate any such inhibition, either in the record of this case or in their speculative ruminations on where the administrative processes might lead. Public officials do not involve themselves in the re-

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[63] Even appellants concede that this Court's decisions require government to assure that limited use of public funds. Appellants' Brief, p. 42. But appellants then take the anomalous position that any administrative processes devised to achieve that result, no matter how narrow and limited those processes, will invalidate a spending program for education.

ligious functions of church-related schools. Those functions continue unabated. The only requirement imposed by the challenged statute is that church-related schools devote Title I facilities to their secular educational functions.[64] That restriction is constitutionally required and is one which church-related schools have willingly accepted and with which they have complied without a loss or diminution of their religious functions.[65]

6. The Alternative Means Test

Appellants have also suggested that the statute they challenge contravenes the Establishment Clause because it employs religion as a means to a secular end. See Appellants' Brief, pp. 46-48. They thus invoke the alternative means test which has found its fullest ex-

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[64] Appellants argue that it is "unrealistic even at the college level to create an island of secularity surrounded by a sea of sectarianism." Appellants' Brief, p. 39. That statement is simply another reflection of appellants' persistent refusal to recognize the secular-religious dichotomy in the functions of church-related schools, despite the record in this case and this Court's decision in *Board of Education* v. *Allen*, 392 U.S. 236, 245-48 (1968).

[65] Appellants' *Walz* argument also places substantial reliance on the opinion in *DiCenso* v. *Robinson*, Civ. No. 4239, U.S.D.C. Rhode Island (decided June 15, 1970). This Court's decision in *Walz* had a decisive impact on the result in *DiCenso*. Even a casual reading of the *DiCenso* opinion reveals two significant facts. First, that decision applied *Walz* to a very specific statutory and administrative scheme which bears no relationship to the administrative processes at issue in this case. In fact, the District Court in *DiCenso* conceded that the Higher Education Facilities Act would be constitutional under its *Walz* analysis. Secondly, the District Court in *DiCenso* misconstrued *Walz* in the same manner that appellants do in this case.

The *DiCenso* case has been appealed to this Court, Nos. 569 and 570, October Term, 1970, and those appeals will be the appropriate vehicle for evaluating the merits of that decision. In fact, until this Court disposes of those appeals, *DiCenso* has no precedential force or value.

pression in two concurring opinions by Mr. Justice Brennan. See *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 230, 294-95 (1963); *Walz* v. *Tax Commission,* 397 U.S. 664, 680 (1970). Mr. Justice Frankfurter also proposed a similar test in his separate opinion in *McGowan* v. *Maryland,* 366 U.S. 420, 462-63 (1961). Even if that alternative means test were the controlling constitutional standard, appellants' Establishment Clause claim would still fail.

In the first place, both Mr. Justice Brennan and Mr. Justice Frankfurter suggested that the alternative means test applied only in the context of legislative programs which generated primarily religious effects. As this brief has amply demonstrated, the primary effect of this statute is neither to advance nor inhibit religion and is therefore secular in nature. Consequently, even as formulated by Mr. Justice Brennan and Mr. Justice Frankfurter, the alternative means test would be inapplicable here.

Secondly, appellants' argument *assumes* that the federal government has employed religion as a means to a secular end. But the statutory scheme at issue in this case and the facts of this case refute that assumption. The federal government has chosen only a secular means—that is, financial assistance for the construction of academic facilities to be used for solely secular purposes—for the achievement of a demonstrably secular purpose. That church-related colleges and universities participate in the contested spending program does not convert that secular means into a religious means. Because of the secular-religious dichotomy in the curricula of church-related schools, the participation of those institutions in the Title I grant program is consistent with the government's use of a secular means to achieve its secular goals.

Finally, appellants misstate the legislative background of the statute when they claim that Congress could have achieved its secular goals without permitting church-related institutions to participate in the Title I grant program. Congress knew that church-related institutions of higher education constituted 40 per cent of all colleges and universities in this country and 60 per cent of all private colleges and universities when the challenged statute was enacted. Congress also knew that state colleges and universities were rapidly approaching the limits of their expansion capacity so that participation of church-related private colleges and universities was indispensable to the accommodation of the burgeoning student population. See p. 43, *supra*. Since only the secular educational functions performed by church-related institutions would be subsidized, Congress decided to draw upon the resources of such institutions while carefully avoiding any use of religion to achieve its results. The Establishment Clause simply does not prohibit the secular means employed by Congress to achieve its secular goals.

D. Conclusion

When a legislative program results in a confluence of government and religious interests, the Establishment Clause demands only that the enactment have a secular purpose and a primary effect that neither advances nor inhibits religion. That constitutional standard recognizes that it would be an idle and futile gesture to seek to relegate government and religious groups to wholly separate spheres of activity in our society, particularly when improving educational quality and expanding educational opportunities are at stake. The command of the Establishment Clause is that the government maintain a position of neutrality

when its interests and those of religious groups coincide. The purpose and primary effect test articulated and applied by this Court fully implements the command of neutrality and gives a full measure of protection to Establishment Clause values. Judged by that constitutional standard, the Higher Education Facilities Act of 1963 clearly passes constitutional muster.

III.

FREE EXERCISE CLAIM

The appellants contend that the Higher Education Facilities Act and the specific grants which they attack also run afoul of the Free Exercise Clause of the First Amendment. That claim is based on the allegation that the actions of the appellees, as well as the statute in question, "constitute compulsory taxation for religious purposes." Complaint ¶ 30, J.A. 14, 34. That claim warrants only brief discussion.

A virtually identical claim was made by the appellants in the *Allen* case. See Brief for Appellants, pp. 31-35, *Board of Education* v. *Allen,* 392 U.S. 236 (1968). The Court dismissed that claim in a single paragraph, observing that the appellants had "not contended that the New York law in any way coerces them as individuals in the practice of their religion." 392 U.S. at 249. That ruling was compelled by precedent. The Court had already held that a Free Exercise claim depends upon a showing of direct governmental pressure. See *Engel* v. *Vitale,* 370 U.S. 421, 430 (1962). The governmental pressures which the Free Exercise Clause prohibits are those which coerce a person to believe or disbelieve in a particular religion or in religion in general. *Torcaso* v. *Watkins,* 367 U.S. 488, 495 (1961). Thus, in *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 223 (1963), the Court declared

that "it is necessary in a free exercise case for one to show the coercive effect of the enactment *as it operates against him in the practice of his religion*. . . . [A] violation of the Free Exercise Clause is predicated on coercion." 374 U.S. at 223. (Emphasis added.)

The appellants here point to no governmental coercion operating against them in the practice of their religion. They allege compulsion in the taxing process and contend that the taxing process is being employed for religious purposes. But absent is any claim that those two factors affect the appellants in their religious practices or beliefs. Indeed, neither the complaint nor the proof at the trial revealed what religious beliefs, if any, are held by the appellants. See *McGowan* v. *Maryland*, 366 U.S. 420, 429 (1961). The parties stipulated at trial that the consciences of the appellants were offended by the use of compulsory taxation to raise the money necessary to finance the Title I grant program. See also Complaint ¶ 34, J.A. 14, 35. But that stipulation cannot overcome the inherent deficiencies of appellants' Free Exercise claim, for coerced or interdicted religious practices or beliefs—and not offended consciences—are the measure of a Free Exercise claim.

The allegation that government is engaging in "compulsory taxation for religious purposes" is a classic statement of an Establishment Clause claim, see *Flast* v. *Cohen*, 392 U.S. 83, 103 (1968), and appellants' Free Exercise claim is, therefore, no more than a restatement of their Establishment Clause claim. As a result, appellants' Free Exercise claim must fail for the same reasons that their Establishment Clause claim fails. Further, appellants allege that their free exercise of

religion has been infringed because the spending program they attack involves compulsory taxation "for religious purposes." But, as has been demonstrated at length above, the spending program challenged by the appellants has a strictly secular purpose. For these several reasons, the court below properly ruled that appellants' Free Exercise claim was totally without merit. J.A. 51-52.

CONCLUSION

For the several reasons stated above, appellants' constitutional claims are without merit and the judgment of the District Court should be affirmed.

October 5, 1970

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

[Excerpt From Proposed Findings of Fact Submitted by the Appellee Colleges and Universities to the District Court]

D. Character of the Defendant Colleges and Universities

[The proposed findings of fact set forth below concern the so-called religious or non-religious nature of the defendant colleges and universities. Those findings are relevant only if the Court adopts the plaintiffs' legal theory and decides the constitutionality of the challenged grants on the basis of whether the recipient institutions are religious or non-religious in nature.]

Fairfield University

32. Fairfield University, founded in 1941, is duly chartered and incorporated under the laws of the State of Connecticut and is authorized by its corporate charter to "establish, organize, maintain and conduct an institution for . . . undergraduate and graduate education in the State of Connecticut" and to "confer all such academic degrees as are usually given in colleges and universities." PX 80; DX F-1.* Under its charter and by-laws, the ultimate governing authority for the University is its Board of Trustees, and it is to the Board of Trustees that the University's President is accountable for his actions. Tr. 465.

33. Fairfield University is fully accredited by the New England Association of Colleges and Secondary Schools, the regional accrediting association which is responsible for the geographical area in which the University is located. Tr. 484; PX 82, p. 22; DX F-2, p. 24.

34. The defendant University presented evidence which established that it imposes no religious qualification for

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* The following citations are used in this Appendix: PX refers to appellants' exhibits at trial; DX refers to the exhibits of the appellee colleges and universities; and Tr. refers to the trial transcript.

membership on its Board of Trustees, employment on its faculty and staff, or admission to its student body. Tr. 468-70, 565-66. The University's Objectives expressly declare that "[i]t welcomes all persons regardless of . . . creed." PX 84, p. 7; PX 85, inside front cover. The University has on its faculty members of various religious faiths, Tr. 541-42, 548, 559-60, 576-77, and the defendant University presented evidence that no inquiry is made concerning an applicant's religious beliefs before he is hired for the faculty or staff. Tr. 541-42, 559-60, 565-66. The plaintiffs presented evidence that the University's student body and administrative staff is predominantly Catholic. Tr. 292-94, 501-02, 517-19. There was no evidence presented, however, to show that the large number of Catholics in the student body and on the administrative staff was the product of deliberate University policy. The Court finds, therefore, that Fairfield University is open to persons of all religious faiths and that no religious qualification is imposed for membership on the Board of Trustees, employment on the faculty and staff, or admission to the student body.

35. Although the defendant University provides its students with the opportunity to attend religious services regularly, PX 137, ¶ 1; PX 82, pp. 25-26; PX 91, pp. 5-6; DX F-2, pp. 27-28, the Court finds that there are no religious services at the University at which attendance by students is required by the University. Tr. 484.

36. The Court finds that the subjects taught at the defendant Fairfield University include the traditional subjects offered by a liberal arts college. Tr. 462-63; DX F-3, pp. 53-117. Among the several academic departments at the defendant University is a Department of Theology which offers students courses about religion. PX 137, ¶ 5. The Court finds that the courses offered in that department are taught as academic disciplines and no effort is made in those courses to indoctrinate students in or to proselytize and propagate the doctrines and teachings of the

Roman Catholic Church. Those findings are based on the following evidence:

a. The plaintiffs and the defendant University have stipulated that the courses taught in the Department of Theology "are taught according to the academic requirements of the subject matter and according to the instructor's concept of professional standards of sound and competent scholarship." PX 137, ¶ 6. The defendant University presented, through testimony, additional evidence that its Theology courses are taught as academic disciplines, Tr. 478-79, 537-38, 576, a concept which one witness defined as the opposite of indoctrinating students in the subject matter. Tr. 538.

b. The defendant University presented unchallenged testimony that no effort is made in the Theology courses to indoctrinate students in the tenets of any religious faith. Tr. 479, 577.

c. The defendant University presented uncontested evidence that it maintained a Department of Theology and offered courses about religion because such courses are considered to be a necessary part of a liberal arts education. Tr. 478, 577. The plaintiffs and defendant University stipulated that some non-church-related institutions of higher learning offer courses about religion, PX 137, ¶ 5, and additional evidence was presented at trial to show that the current trend among both public and private colleges is to add courses about religion to their curricula. Tr. 347, 606-09. Trinity College and Wesleyan University, two Connecticut schools which the plaintiffs view as constitutionally eligible to receive public funds, Complaint, ¶ 26, have Departments of Religion and offer a considerable number of courses about religion. DX DC-1, pp. 146-52; DX DC-2, pp. 157-58; DX DC-3.

d. The plaintiffs elicited testimony that courses about Roman Catholic dogma and doctrine play a "significant" part in the course offerings of the Theology Department.

Tr. 511-12. However, the parties stipulated that "[t]he courses in the Theology Department cover a range of human religious experiences and are not limited to courses about the Roman Catholic religion." PX 137, ¶ 5. The defendant University presented evidence that the courses offered and taught in the Theology Department cover all major religions and both Christian and non-Christian faiths. Tr. 575-76.

e. Catholic students at the defendant University are required to take two specified courses and two elective courses in the Theology Department. PX 137, ¶ 5.[10] Of the thirteen members of the Theology Department, eight are Jesuit priests, three are Catholic laymen, one is a Protestant minister and one is a rabbi. PX 137, ¶ 5. The rabbi teaches one of the courses required of all Catholic students. Tr. 534.

37. The Court finds, on the basis of uncontroverted evidence presented by the defendant University, that there is no effort made at the University to indoctrinate students in or to proselytize or propagate the tenets and doctrines of the Roman Catholic faith or of any other religious faith. Tr. 479, 507, 577, 581.[11]

38. The Court finds that the defendant University fosters an atmosphere of academic freedom. That finding is based on a consideration of the following evidence:

a. The University subscribes to the 1940 Statement of Principles on Academic Freedom and Tenure endorsed by

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[10] The Theology requirement will be reduced to two required courses in the 1970-1971 academic year. Tr. 577-78.

[11] One of the documents offered in evidence by the plaintiffs stated that it was the policy of the University "to prevent formal proselytizing in an area of religion contrary to that which the University represents." PX 89, p. 34. However, the plaintiffs presented no evidence to show that the University would condone proselytizing of that area of religion which the University represents—namely, Catholicism. And the evidence presented by the defendant University on that issue would refute any such implication. Tr. 479, 577.

the American Association of University Professors and the Association of American Colleges. Tr. 474-75; PX 89, p. 33; PX 137, ¶ 4; DX F-6.

b. The plaintiffs offered documentary evidence which reflected the defendant University's expectation that "no professor will attempt within his teaching to propound doctrines in such a way that they would be intended to persuade students to accept them by reason of the professor's authority or personal persuasion if such doctrines are in clear and direct violation of common Catholic teaching." PX 89, pp. 33-34. That same document recites that the contractual undertaking between the University and a professor provides that the contract can be terminated, *inter alia*, for "any grave offense against Catholic doctrine or morality." PX 89, p. 34; PX 140.

c. The defendant University presented uncontested testimony by faculty members and the University's President which established that the faculty enjoys "complete academic freedom," Tr. 474-75, 536, 560-61, 564-65, that no effort is made by members of the administration or department chairmen to censor or control the content of courses taught at the University, Tr. 475-77, 550-51, 564, and that there has been no instance in which there has been any effort to restrict what a faculty member may teach in the classroom. Tr. 476-77, 510.

d. Despite the statements contained in the document cited in subparagraph b, *supra*, faculty members who are not Catholic testified that they enjoyed full academic freedom and that no effort has been made to impose limitations on what they can teach, even when the content of their courses conflicts with Catholic doctrine. Tr. 536-37, 559-61.

39. The Court finds that defendant Fairfield University is a church-related institution of higher learning, PX 137, ¶ 1, and the church with which the relationship exists is the Roman Catholic Church. The Court further finds that the relationship exists not because of any control exercised

over the University or its affairs by the Roman Catholic Church or by any entity of that church, but because the University identifies itself in several of its publications as "Catholic" and "Jesuit" and because of the presence at the University of other physical manifestations of that church relationship. The bulk of the case presented by the plaintiffs with respect to defendant Fairfield University established the existence of the following physical manifestations of the church relationship:

a. Members of the Society of Jesus, a religious order within the Roman Catholic Church, serve on the University's governing board, administrative staff and faculty. Tr. 501-05, 517-19; PX 137, ¶ 1; DX F-2, pp. 10-22.

b. In its publications, the University identifies itself with "the Jesuit tradition of education." Tr. 505-08, 581-82; PX 82, p. 25.

c. Several of the buildings at the University campus are named after Jesuit saints. Tr. 497-99.

d. Some of the buildings at the campus contain religious symbolism, and some of the classrooms have crucifixes on the walls. Tr. 499-501.

e. The defendant University suspends classes on Roman Catholic holy days. DX F-2, pp. 8-9.

f. The University receives a financial benefit from the "contributed services" of the Jesuits who serve on its faculty and staff. Each such Jesuit is paid a salary according to his rank and years of service, and the total amount of the salaries earned by all Jesuits is credited to the Jesuit community at the University. The cost of the maintenance of the members of the community is deducted from that amount, and the balance is contributed back to the University. PX 137, ¶ 2. Aside from the "contributed services" of the Jesuits, the University receives no financial support from the Roman Catholic Church. Tr. 473.

g. The University schedules regular religious services on campus for its Catholic students. PX 82, pp. 25-26;

PX 91, pp. 5-6; DX F-2, pp. 27-28. While there have been non-Catholic religious services conducted on campus, there is no non-Catholic chapel available on campus for such services. Tr. 516. The University has a Catholic chaplain, a Protestant chaplain, a Jewish chaplain, and an Eastern Orthodox chaplain. Tr. 517; PX 82, p. 26.

h. Among the educational associations with which the University affiliates itself are the Jesuit Educational Association and the National Catholic Educational Association. DX F-2, p. 24.

Sacred Heart University

40. Defendant Sacred Heart University, founded in 1963, is duly chartered and incorporated under the laws of the State of Connecticut and is authorized by its corporate charter to "establish, organize, maintain and conduct an institution for . . . undergraduate education in the State of Connecticut" and to "confer all such academic degrees as are usually given in colleges and universities." Tr. 342-43; PX 97; PX 99. The ultimate governing authority for the defendant University is its Board of Trustees. Tr. 351.

41. At the time of the trial of this action, the defendant University was a recognized candidate for accreditation by the New England Association of Colleges and Secondary Schools, the regional accrediting association which is responsible for the geographical area in which the University is located. Tr. 331-32; PX 101, p. 5; PX 115, p. 5; DX SH-2, p. 5. Candidacy for accreditation is the step immediately preceding the status of full accreditation. Tr. 331-32.[12]

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[12] The defendant University represents to the Court, and will request permission to insert into the record at the time of the closing arguments, the fact that it was granted full accreditation by the New England Association of Colleges and Secondary Schools on December 5, 1969, the day on which the trial of this action ended.

42. The Court finds that the defendant University is open to persons of all religious faiths and imposes no religious qualification as a condition for employment on its faculty and staff or for admission to its student body. That finding is based on a consideration of the following evidence:

a. The University's President, Dr. Conley, testified that no religious qualification is imposed for employment on the faculty and staff or for admission to the student body, that the faculty and student body contains persons of all religious faiths, that he has the ultimate authority for hiring members of the faculty and that he does not take account of an applicant's religious beliefs in the hiring process. Tr. 349-50.

b. The plaintiffs offered in evidence a copy of the University's faculty application form which asks the applicant's religious preference. PX 103. However, not all members of the faculty complete the application form before they are hired. Tr. 373-74; PX 114, pp. 66-69. Further, a non-Catholic member of the faculty testified that, when she was interviewed for employment, she was not asked her religious persuasion. When she volunteered that she was not a Catholic, she was told that fact was irrelevant. Tr. 594.

c. The defendant University holds itself out to the public as "open to qualified students of all denominations." PX 101, inside front cover. The plaintiffs offered in evidence a copy of the University's Application for Admission form, which asks an applicant's religious preference. PX 95. There is evidence, however, that the responses to that question are used to seek a greater religious diversity in the student body. PX 114, pp. 16-17, 19-20. Approximately 80 per cent of the student body is Catholic. PX 114, p. 17.

43. Although the defendant University provides its students with the opportunity to attend religious services

regularly, PX 138, ¶ 1; PX 101, p. 9; PX 106, p. 6; PX 108, p. 14, the Court finds that there are no religious services at the University at which attendance by students is required by the University. Tr. 356.

44. The Court finds that the courses taught at the defendant Sacred Heart University are those which are normally offered at colleges offering a Bachelor of Arts degree. Tr. 343-44; DX SH-2, pp. 47-72. Among the several academic departments at the defendant University is a Department of Religious Studies which offers students courses about religion. PX 138, ¶ 5. The Court finds that the courses offered in that department are taught as academic disciplines and no effort is made in those courses to indoctrinate students in or to proselytize and propagate the doctrines and teachings of the Roman Catholic Church. Those findings are based on a consideration of the following evidence:

a. Plaintiffs and the defendant University have stipulated that the courses taught in the Department of Religious Studies "are taught according to the academic requirements of the subject matter and according to the instructor's concept of professional standards of sound and competent scholarship." PX 138, ¶ 6. The defendant University presented, through testimony, additional evidence that its Religious Studies courses are taught as academic disciplines. Tr. 346, 527, 602.

b. The defendant University presented unchallenged testimony that no effort is made in the Religious Studies couses to indoctrinate students in the tenets of any religious faith. Tr. 372, 528, 602.

c. Two courses in the Religious Studies Department are required of all students at the University. Tr. 605-06; PX 114, pp. 40-45; PX 138, ¶ 5. One of the required introductory courses is taught by a rabbi, who is a member of the Religious Studies Department. Tr. 526-27, 601-02.

d. The plaintiffs and the defendant University stipulated that the courses taught in the Religious Studies Department "cover a range of human religious experiences and are not limited to courses about the Roman Catholic religion." Tr. 602-03; PX 138, ¶ 5. Additional evidence was presented to support that fact. Tr. 346-47; DX SH-2, pp. 68-69.

e. Additional evidence was presented at trial to show the current trend among both public and private colleges is to add courses about religion to their curricula. Tr. 347, 606-09. Trinity College and Wesleyan University, two Connecticut schools which the plaintiffs view as constitutionally eligible to receive public funds, Complaint, ¶ 26, have Departments of Religion and offer a considerable number of courses about religion. DX DC-1, pp. 146-52; DX DC-2, pp. 157-58; DX DC-3.

45. The Court finds, on the basis of uncontroverted evidence presented by the defendant University, that there is no effort made to indoctrinate students in or to proselytize or propagate the tenets and doctrines of the Roman Catholic faith or of any other religious faith. Tr. 353, 372, 528, 602, 604.

46. The plaintiffs and defendant University have stipulated that the defendant University has adopted the 1940 Statement of Principles on Academic Freedom and Tenure, as approved by the American Association of University Professors and the Association of American Colleges, as its official policy on matters of academic freedom and tenure. PX 138, ¶ 4. The Court finds, on the basis of uncontroverted evidence, that the faculty and students at the defendant University enjoy complete and unhindered academic freedom. Tr. 353-54, 372, 527-30, 594-95, 598-600, 604, 613; PX 114, pp. 35-37; DX SH-3, p. 13; DX SH-4, p.22.

47. The Court finds that the defendant Sacred Heart University is a church-related institution of higher learn-

ing, PX 37, ¶ 1, and the church with which the relationship exists is the Roman Catholic Church. The Court further finds that the relationship exists not because of any control exercised over the University or its affairs by the Roman Catholic Church or by any entity of that church, but because the University identifies itself in several of its publications with the philosophy of Catholic education and because of the presence at the University of other physical manifestations of that church relationship. The bulk of the case presented by the plaintiffs with respect to defendant Sacred Heart University established the existence of the following physical manifestations of the church relationship:

a. The University has described itself in some of its publications as "The Roman Catholic Diocesan Commuter Co-Educational University." Tr. 376; PX 115; PX 116; PX 117; PX 118; PX 119; PX 120; PX 121.

b. The Chairman of the University's twelve-member Board of Trustees is the Most Reverend Walter W. Curtis, Bishop of the Roman Catholic Diocese of Bridgeport and the person who provided the impetus for the founding of Sacred Heart University. DX SH-2, pp. 4, 17. Two of the other members of the Board are Roman Catholic priests, and there is one vacancy on the Board due to the recent death of a priest. The remaining eight members of the Board are laymen. Tr. 351-52.

c. Teachers at the University are permitted to recite prayers in their classrooms if they wish. Tr. 360-61, 370-72.

d. The University has a Catholic chapel, at which are conducted regular religious services for Catholic students. PX 106, p. 6. Although there have been non-Catholic religious services conducted on campus, there is no chapel available for such services. Tr. 591-92.

e. Some of the classrooms at the defendant University have had crucifixes on the walls. Tr. 600.

f. The defendant University identifies itself in its Statement of Objectives with "the philosophy of Christian education in twentieth century America." Tr. 367-70; PX 115, p. 16. One source of the philosophy of education articulated in the University's Objectives is the Encyclical on the Christian Education of Youth by Pope Pius XI and the documents of Vatican II. Tr. 339-41.

g. The defendant University suspends classes on Roman Catholic holy days. DX SH-2, pp. 15-16; PX 115, pp. 6-7.

h. Although the University receives none of its current operating funds from church sources and it has received no gifts from church sources, it received advances in the amount of $301,132.15 from the Diocese of Bridgeport during the early years of the University's existence. In addition, the University owes the Diocese an additional $46,440.00 for a note taken by the Diocese at the time that the University purchased the land occupied by the Library building. That note covered the total purchase price of the land. The Diocese owns the land and facilities utilized by the University. The land and facilities have been leased to the University for a thirty-year term. The lease agreement provides for an annual rental of $1 per year for the first ten years, with a provision for renegotiation of the annual rental at the end of ten years. PX 138, ¶ 3.

Albertus Magnus College

48. Albertus Magnus College, founded in 1925, is duly chartered and incorporated under the laws of the State of Connecticut and is authorized by its incorporating act to "establish, organize, maintain and conduct an institution for the higher education of women" and to "confer such academic and honorary degrees and diplomas as are usually given in colleges." DX AM-1. The control and management of the affairs of the College are vested in its Board of Trustees, DX AM-1, and that Board is the group to which the President of the College is responsible. Tr. 626.

49. Albertus Magnus College is fully accredited by the New England Association of Colleges and Secondary Schools, the regional accrediting association which is responsible for the geographical area in which the College is located. Tr. 651-52; PX 42, p. 9; DX AM-4, p. 8.

50. The defendant College presented evidence which established that it imposes no religious qualification for membership on its faculty and staff or for admission to its student body. Tr. 633, 635-36. The College has on its faculty members of various religious faiths, Tr. 650, 695-96, 704; PX 55, pp. 19-20, and the defendant College presented evidence that no inquiry is made concerning an applicant's religious beliefs before he is hired for the faculty or staff, Tr. 633, 695-96, 704,[13] or before she is admitted to the student body. Tr. 635-36. The plaintiffs elicited testimony that the College's student body is predominantly Catholic. Tr. 690. There was no evidence presented, however, to show that the large number of Catholics in the student body was the product of deliberate College policy. The Court finds, therefore, that Albertus Magnus College is open to persons of all religious faiths and that no religious qualification is imposed for employment on the faculty and staff or admission to the student body.

51. Although the defendant College provides its students with the opportunity to attend religious services regularly, PX 42, pp. 15-16, the Court finds that there are no religious

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[13] The plaintiffs elicited testimony that, until three or four years ago, the faculty application form employed by the defendant College asked an applicant's religious preference. Tr. 671-73; PX 55, p. 19. However, there was no evidence presented to show that the response to that question was used in the decision to hire or not hire a particular applicant. In fact, two witnesses who were hired when the application form in question was being used testified that they had not been questioned concerning their religious beliefs when they were hired. Tr. 695-96, 704.

services at the College at which attendance by students is required by the College. Tr. 685-87.[14]

52. The Court finds that the defendant Albertus Magnus College, as a liberal arts school, offers its students courses in fifteen departments. Tr. 625, 630; PX 42, pp. 37-72. The plaintiffs and the defendant College have stipulated that among the several academic departments at the College is a Department of Religious Studies which offers courses about religion, that the courses in the Religious Studies Department cover a range of human religious experiences and are not limited to courses about the Roman Catholic religion, that the current policy of the College is to require Catholic students to take two specified courses in the Religious Studies Department, and that the courses in that department are taught by two Roman Catholic priests and a rabbi. PX 131, ¶ 4. The plaintiffs and the defendant College further stipulated that the courses in the Religious Studies Department are taught according to the academic requirements of the subject matter and according to the instructor's concept of professional standards of sound and competent scholarship. PX 131, ¶ 5. The defendant College presented uncontroverted testimony that there is no effort made at the College to inculcate students in or to proselytize Catholic doctrine. Tr. 657, 714. Therefore, the Court finds that the courses taught in the Department of Religious Studies at the defendant College are not employed for the purpose of propagating the tenets and doctrines of the Roman Catholic faith.

53. The defendant College presented evidence that there is no effort made at the College to indoctrinate students with or to proselytize or propagate the tenets and doctrines

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[14] The defendant College's 1965 Catalog, offered in evidence by the plaintiffs, states that "[a]ll Catholic students are required to make the annual retreat." PX 139, p. 15. However, no evidence was produced to explain the nature of the "annual retreat." Further, the next edition of the College's catalog stated that "[r]etreats are voluntary." PX 42, p. 15.

of the Roman Catholic faith. Tr. 657, 714. A document offered in evidence by the plaintiffs described as one of the purposes of the College to "instill Catholic ideals," and described the College as "a Catholic institution committed to the inculcation of Christian faith and morality." PX 39, pp. 9, 13. However, the defendant College presented evidence that the portion of that document containing the latter quotation had never been given force or effect at the College. Tr. 653-54. Therefore, the Court finds that there is no effort made at the College to indoctrinate students in or to proselytize or propagate the tenets and doctrines of the Roman Catholic faith.

54. The Court finds that the defendant Albertus Magnus College affords the members of its faculty a full measure of academic freedom. That finding is based upon a consideration of the following evidence:

a. The plaintiffs and the defendant College have stipulated that the College has adopted as its official policy statement on academic freedom the 1940 Statement of Principles on Academic Freedom and Tenure, as adopted by the American Association of University Professors and the Association of American Colleges. PX 131, ¶ 3.

b. The defendant College presented uncontested testimony that no effort is made by the College to restrict the content of courses taught there, that there is no subject matter which cannot properly be taught at the College, that faculty members have enjoyed "complete academic freedom" and that the academic freedom existing at the College compares favorably with that existing at other institutions of higher learning. Tr. 636-37, 653-54, 696-99, 704-06, 709-12.

c. The plaintiffs and the defendant College have stipulated that all courses offered and taught at the College are taught according to the academic requirements of the subject matter and according to the instructor's concept of

professional standards of sound and competent scholarship. PX 131, ¶ 5.

d. The plaintiffs offered in evidence a document which, in purporting to state the College's policy on academic freedom, provided that a faculty member "is not free to disseminate doctrines and views that are subversive . . . of the aims and purposes of the College as a Catholic institution committed to the inculcation of Christian faith and morality." PX 39, p. 13. However, the defendant College presented evidence that the academic freedom provision has never been in force or operation and that the College, since 1957, has "followed substantially" the 1940 Statement of Principles referred to in subparagraph a above. Tr. 633, 654-56, 709-12. Further, the academic freedom provision of PX 39 has been superceded by a provision in the Faculty Constitution, DX AM-3, pp. 1-2, which adopts verbatim the 1940 Statement of Principles referred to above.

55. The Court finds that defendant Albertus Magnus College is a church-related institution of higher learning, PX 131, ¶ 1, and that the church with which the relationship exists is the Roman Catholic Church. The Court further finds that the relationship exists not because of any control exercised over the College or its affairs by the Roman Catholic Church or by any entity of that church, but because the College identifies itself in several of its publications as "Catholic" and because of the presence at the College of other physical manifestations of the church relationship. The bulk of the case presented by the plaintiffs with respect to defendant Albertus Magnus College established the existence of the following physical manifestations of the church relationship:

a. Members of the Dominican Sisters of Saint Mary of the Springs founded the College and have, from its inception, served on the College's Board of Trustees and its faculty and administrative staff. Tr. 664-67; DX AM-4, p. 5; PX 42, pp. 76-81; PX 139, pp. 72-76.

b. Some of the names of the buildings at the College's campus have significance in the Roman Catholic religion. Tr. 661-64.

c. Some of the building and classrooms on campus contain religious symbols, such as crucifixes. Tr. 692-93.

d. Catholic religious services are conducted regularly on campus. Tr. 685-87; PX 42, pp. 15-16.

e. There are two Catholic chapels at the campus of the defendant College, but there are no non-Catholic chapels. Tr. 684.

f. The defendant College suspends classes on Roman Catholic holy days. PX 42, pp. 86-87; DX AM-4, p. 95.

56. The Court finds that the defendant College receives no financial support from the Catholic Church, the local Diocese or from the Dominican Sisters of Saint Mary of the Springs. Tr. 631-32, 651.

Annhurst College

57. Annhurst College, founded in 1943, is duly chartered and incorporated under the laws of the State of Connecticut and is authorized by its incorporating act to "establish, organize, maintain and conduct an institution for the education of women in the various departments of higher education" and to "confer such academic degrees, provided the curriculum and character of work of said college shall be approved by the state board of education, and grant such diplomas or certificates as are customary in institutions of education." PX 56; Tr. 731. The Board of Trustees is the governing body of the College and is the body to which the College's President is responsible for her actions as President. Tr. 717.

58. Defendant Annhurst College is fully accredited by the New England Association of Colleges and Secondary Schools, the regional accrediting association which is re-

sponsible for the geographical area in which the College is located. Tr. 731; PX 59, inside front cover; DX A-1, inside front cover.

59. Defendant Annhurst College presented evidence that it imposes no religious qualification as a condition to employment on its faculty and staff or to admission to its student body. Tr. 719, 762-63, 771. The plaintiffs offered in evidence the College's Application for Admission form, which asks the religious preference of the applicant and her parents. PX 70. The plaintiffs also elicited testimony that 95 per cent of the student body is Catholic and that of 25 lay persons on the faculty, approximately 15 are Catholic. Tr. 731. However, no evidence was presented to show that the high percentages of Catholics in the student body is the result of deliberate College policy or of the answers to the questions concerning religious preference on the Application for Admission form. Further, the defendant College presented uncontested evidence that an applicant's religious beliefs play no role in the faculty hiring process. Tr. 762-63, 771. Therefore, the Court finds that, despite the high percentage of Catholics in the student body, there is no religious qualification imposed by defendant Annhurst College as a condition to employment on its faculty and staff or to admission to its student body.

60. Although the defendant Annhurst College provides its students with an opportunity to attend religious services regularly, Tr. 743-44; PX 59, p. 7; DX A-1, p. 7, the Court finds that there are no religious services at the College at which attendance by students is required by the College. Tr. 726.[15]

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[15] The President of the defendant College testified during the course of her deposition that there was an "unconscious effort" made to encourage students to attend Catholic religious services. PX 79, pp. 45-46. However, she disclaimed that statement during her testimony at the trial of this action. Tr. 740-41.

61. The Court finds that defendant Annhurst College offers its students a variety of courses typically offered at a liberal arts college. Tr. 717, 718; PX 59, pp. 31-65. Among the several academic departments at the defendant Annhurst College is a Department of Theology which offers students courses about religion. PX 129, ¶ 3. The Court finds that the courses offered in that department are taught as academic disciplines and that no effort is made in those courses to indoctrinate students in or to proselytize and propagate the doctrines and teachings of the Roman Catholic Church. Those findings are based on a consideration of the following evidence:

a. The plaintiffs and the defendant College have stipulated that all courses offered and taught at the College, including those in the Department of Theology, are taught according to the academic requirements of the subject matter and according to the instructor's concept of professional standards of sound and competent scholarship. PX 129, ¶ 4.

b. The defendant College presented testimony that the courses in the Department of Theology are taught as academic disciplines and that no effort is made in those courses to inculcate or indoctrinate students with the teachings of the Roman Catholic Church. Tr. 726. The plaintiffs did not directly challenge or contest that testimony.

c. The plaintiffs elicited testimony that Catholic students, and only Catholic students, are required to take twelve credits in Theology to graduate, Tr. 745-47, that the bulk of the courses offered in the Theology Department focus on Roman Catholic doctrine, Tr. 747-48, and that all of the courses offered in the Theology Department are taught by two Roman Catholic priests. Tr. 748.

62. The Court finds that there is no effort made at the defendant Annhurst College to indoctrinate students in or

to proselytize or propagate the tenets and doctrines of the Roman Catholic Church. Tr. 726, 727-28, 768.[16]

63. The Court finds that the defendant Annhurst College affords its faculty a full measure of academic freedom. That finding is based on a consideration of the following evidence:

a. The plaintiffs and the defendant College stipulated that all courses offered and taught at the College are taught according to the academic requirements of the subject matter and according to the instructor's concept of professional standards of sound and competent scholarship. PX 129, ¶ 4.

b. The defendant College presented additional evidence that faculty members may teach what they wish in the classroom without administration supervision, Tr. 726-27, 764, 770-771, that there has been no effort made to prevent the teaching of subject matter which is contrary to Catholic doctrine, Tr. 727-28, that the 1940 Statement of Principles on Academic Freedom and Tenure, as approved by the American Association of University Professors and the Association of American Colleges, has been observed by the College during the tenure of its current President, Tr. 728, and that the College's current President is merely continuing the pattern of academic freedom which she found to exist at the College when she assumed her duties. Tr. 728.

c. The plaintiffs offered in evidence a document which recites that a faculty member at the defendant College "is not free to disseminate doctrines and views that are subversive of . . . the aims and purposes of the College as a

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[16] The plaintiffs offered in evidence a document which described the defendant College as "a Catholic institution committed to the inculcation of Catholic faith and morality." PX 129, p. 5. However, the President of the defendant College testified that that provision of the document had not been in force since she assumed her position in 1965. Tr. 727.

Catholic institution committed to the inculcation of Christian faith and morality." PX 129, p. 4. The plaintiffs also elicited testimony that PX 129 is the only operative and official document of the defendant College which contains any statement on academic freedom. Tr. 752-53.

d. The defendant College presented testimony that the academic freedom statement of PX 129 has had no force or effect during the tenure of the current President of the College, Tr. 727, and that faculty members at the College have enjoyed unhindered academic freedom despite the quoted provision of PX 129. Tr. 763-65, 770-72.

64. The Court finds that the defendant Annhurst College is a church-related institution of higher learning, PX 129, ¶ 1, and that the church with which the relationship exists is the Roman Catholic Church. The Court further finds that the relationship exists not because of any control exercised over the College or its affairs by the Roman Catholic Church or by any entity of that church, but because the College identifies itself as "Catholic" in several of its publications and because of the presence at the College of other physical manifestations of that church relationship. The bulk of the case presented by the plaintiffs with respect to defendant Annhurst College established the existence of the following physical manifestations of the church relationship:

a. From the inception of the defendant College, members of the Daughters of the Holy Spirit, a religious order within the Roman Catholic Church, have served on the College's governing board, administrative staff and faculty. Tr. 734-39; PX 59, 67-75.

b. Publications of the defendant College describe it as a "Catholic liberal arts college for women" and state that it is "conducted by the Daughters of the Holy Ghost." Tr. 739-40.

c. The Daughters of the Holy Spirit provided the initial capital funds to initiate the defendant College, and the

College has received one gift from the Roman Catholic Diocese of Norwich. Tr. 748. However, the College receives no regular financial support from the religious order or from other Catholic Church sources. Tr. 728-29.

d. The Sisters and priests on the faculty wear their religious garb while teaching classes at the College. Tr. 749.

e. The defendant College suspends classes on Roman Catholic holy days. Tr. 750.

f. The College has a Catholic chaplain and provides regular Catholic religious services on campus. Tr. 743-44. The College has no non-Catholic chaplains and provides no non-Catholic religious services on campus. Tr. 745.

g. Among the campus student organizations are two Catholic honorary societies. Tr. 744-45.

h. A Catholic chapel is located in one of the dormitories and all dormitory rooms have crucifixes on the walls. Tr. 732-33.

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Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1970

No. 163

ELEANOR TAFT TILSON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RALPH, ELIZABETH R. SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANKENHAND, JAY S. ROTH, CARL W. SCHNEIDER, NORMAN T. DAVIS, HERBERT T. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PRENDERGAST, *Appellants*,

v.

ELLIOT L. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY and ALBERTUS MAGNUS COLLEGE, *Appellees*.

On Appeal From a Three-Judge United States District Court for the District of Connecticut

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, THE ASSOCIATION OF AMERICAN COLLEGES, THE NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES, THE ASSOCIATION OF AMERICAN UNIVERSITIES AND THE COUNCIL FOR THE ADVANCEMENT OF SMALL COLLEGES IN SUPPORT OF APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 153

ELEANOR TAFT TILTON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RAISNER, ELISABETH R. SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANSHARD, JAY S. ROTH, CARL W. SCHAEFER, NORMAN T. DAVID, HERBERT T. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PENDLETON, *Appellants*,

v.

ELLIOT L. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY and ALBERTUS MAGNUS COLLEGE, *Appellees*.

On Appeal From a Three-Judge United States District Court for the District of Connecticut

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, THE ASSOCIATION OF AMERICAN COLLEGES, THE NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES, THE ASSOCIATION OF AMERICAN UNIVERSITIES AND THE COUNCIL FOR THE ADVANCEMENT OF SMALL COLLEGES IN SUPPORT OF APPELLEES

INTEREST OF AMICI CURIAE

The American Council on Education, the Association of American Colleges, the National Association of State Universities and Land-Grant Colleges, the Association of American Universities and The Council

for the Advancement of Small Colleges appear before the Court as amici curiae by reason of their interest in the resolution of the important constitutional issues under the first and fourteenth amendments which have been raised in the District Court below. The amici do not appear as champions of any particular institutional interests but as representatives of their common interest in United States higher education, undergraduate and graduate.

The American Council on Education is a council of national and regional education associations and institutions of higher education. Since its founding in 1918, the Council has been a center of cooperation and coordination for the improvement of education at all levels, with particular emphasis on higher education. Membership in the Council is by organization or institution, not by individual. There are institutional members from the 50 states, the District of Columbia, the Canal Zone, Guam and Puerto Rico representing 69 percent of the public and 80 percent of the private accredited institutions of higher education in the United States.

The present members and affiliates of the Council are as follows: 21 national and regional associations and organizations; 1,349 institutions of higher education, including the four institutions involved in the case at bar; and 83 affiliated institutions and organizations. In addition to national and regional organizations having interests related to education, associated organization members include state departments of education, city school systems, and private school systems.

The Association of American Colleges is the national organization of colleges of liberal arts and sciences, whether self-contained institutions or parts of com-

plex universities. It admits to its membership any duly accredited institution, regardless of affiliation and governance, that devotes a substantial share of its resources to providing undergraduates with a liberal education as distinct from professional or vocational training.

The present membership of the Association in the United States (excluding four overseas institutions) comprises 869 colleges and universities. This represents over 90 percent of all accredited liberal arts colleges and nearly 60 percent of all degree-granting institutions in the United States. Of these 869, 56 percent (487 institutions) are officially classified as affiliated with one or other of the churches; 18 percent (155 institutions) are maintained by federal, state or local government and 26 percent (227 institutions) are subject only to the authority of their own governing bodies and independent of any external control other than the public law.

The National Association of State Universities and Land-Grant Colleges represents a unification in 1963 of the membership of the Association of State Universities and Land-Grant Colleges, founded in 1887; the National Association of State Universities, founded in 1895; and The State Universities Association, founded in 1918. The first two named are the nation's oldest organizations of institutions of higher education.

The Association's membership includes 113 universities and colleges of which 13 are major campuses of member multi-campus universities. Of these, 69 are land-grant institutions (counting multi-campus universities as one); one is a city university; and the others

are major state universities which are not "land-grant" institutions (though several received federal grants of land under acts other than the Morrill Act). Two land-grant institutions (Cornell University and the Massachusetts Institute of Technology) are privately controlled. Affiliated with Cornell are certain contract colleges of the State University of New York.

Academic programs of NASULGC institutions encompass the full range of the arts, humanities and sciences. They award about 30 percent of all four-year bachelors and first professional degrees, 40 percent of all master's degrees, and 60 percent of all doctorates.

The Association of American Universities is a group of 46 major public and private American universities preeminent in graduate study and research. These universities award approximately three-quarters of the Ph.D.s produced in the nation and conduct approximately the same proportion of the university-based research.

The Council for the Advancement of Small Colleges admits to membership nonprofit, independent, private, four-year, liberal arts colleges with an enrollment of no more than 1,500 students. Each college must either have attained Correspondent status with its regional accrediting association or have been listed, or present evidence of eligibility for listing, in the *Education Directory, Part 3, Higher Education* published by the United States Office of Education.

The present membership of the Council comprises 91 colleges and universities in 35 states. Of these institutions, 61 are fully accredited. None of the member colleges are maintained by federal, state or local government. Seventy-one percent (65 institutions) are affiliated with some church and 29 percent (26 institu-

tions) are independent of any external control other than public law.

The great majority of the member institutions of the amici participate in various federal programs of higher education and, in particular, benefit from programs under the Higher Education Facilities Act of 1963. The constitutional validity of many, if not all, of these programs as applied to both secular and nondenominational colleges and universities is at issue as a result of the decision of the United States District Court for the District of Connecticut below. Problems confronting these private and public institutions in providing facilities to accommodate a continuously increasing college enrollment are substantial. The condition of this challenge is generally recognized in our society and requires no elaboration. If a substantial number of accredited private colleges and universities are disqualified from receiving federal support for carefully restricted nonreligious purposes, then not only will they be unable to play any part in meeting the demand for increased enrollment but their very existence may be threatened. In such case, the burden on public institutions of higher education will be substantially increased. Indeed, the vital federal support to all institutions of higher education provided under the Higher Education Facilities Act of 1963 and similar federal programs may be threatened.

Consents of both appellants and appellees to the appearance of the American Council on Education, the Association of American Colleges, the National Association of State Universities and Land-Grant Colleges, the Association of American Universities and The Council for the Advancement of Small Colleges as amici have been filed with this brief.

ARGUMENT

The Higher Education Facilities Act of 1963[1] here drawn into question allocates federal funds to colleges and universities for the construction of academic facilities. These comprise structures suitable for use as classrooms, laboratories, libraries, or the like. In addition to meeting certain other criteria, the institutions must be accredited by a nationally recognized accrediting agency. No funds may be used for construction of "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . primarily in connection with any part of the program of a school or department of divinity. . . ." 20 U.S.C. Sec. 751. The principal question is whether the inclusion of religiously affiliated colleges and universities in the broader class of institutions of higher learning eligible for this assistance contravenes the establishment clause of the first amendment.

In familiar contexts this Court has formulated the principles which sustain this Act against the present challenge. It has long been accepted that fire and police protection and similar services may permissibly extend to the secular and sectarian alike. See *Everson* v. *Board of Educ.*, 330 U.S. 1, 17-18 (1947). In *McGowan* v. *Maryland*, 366 U.S. 420, 445 (1961), the Court noted with respect to Sunday closing laws that "the present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals." *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 222 (1963),

[1] 77 Stat. 363, 20 U.S.C. Sec. 701 (1963), hereafter cited as "the Act."

elaborated this theme in respect to permissible governmental action in terms, first, of a secular legislative purpose, secondly, of a primary effect which neither advances nor inhibits religion. *Board of Educ.* v. *Allen,* 392 U.S. 236 (1968), applied the *Schempp* formulation in validating a New York law requiring the lending of secular books free of charge to all students including those in attendance at parochial schools. *Walz* v. *Tax Comm'n,* 397 U.S. 664 (1970), sustained the validity of property tax exemptions for religious bodies among other educational and charitable institutions: the constitutional desiderata, according to the Court, were a "legislative purpose . . . not aimed at establishing, sponsoring, or supporting religion" and an end result or effect not involving "excessive government entanglement with religion." 397 U.S. at 674.

These decisions illustrate a vital point: the secular characteristics of an institution or activity may be regarded as conceptually (and constitutionally) distinct from commingled sectarian characteristics in considering the propriety of contested governmental action. If the secular characteristics are the subject matter of action otherwise within the competence of the state, and if the action results neither in excessive entanglements with religion nor, in primary effect, in its advancement or inhibition, then the action does not run athwart the establishment clause. Nowhere, perhaps, was this discreteness of function more clearly illustrated than in *Allen.* Taking as premises the adequacy of the *secular* education provided students in religious schools and the propriety of governmental action furthering secular education generally, the Court held constitutional the furnishing of secular textbooks to students in both public and parochial schools. On the record presented, the Court was unable to conclude

"either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished students by the public are in fact instrumental in the teaching of religion." 392 U.S. at 248.

This case is similar to *Allen*. The educational goals which the Act seeks to, and does in fact, further are plainly secular. Congress found and declared that the security and welfare of the nation require that American youth "be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education." 20 U.S.C. Sec. 701. To accomplish this goal, funds are made available to assist in the construction of academic facilities, but only to those colleges and universities which are accredited by a nationally recognized accrediting agency.[2] The principal nationally recognized accrediting agencies are the six regional associations which make up the Federation of Regional Accrediting Commissions of Higher Education. These agencies conduct examinations of colleges and universities and accredit those which meet certain academic standards. Of one of these regional associations, for example, it was recently said:

> "Middle States [Association of Colleges and Secondary Schools] has achieved a position of great

[2] The Act further requires the Commissioner of Education to "publish a list of nationally recognized accrediting agencies or associations which he determines to be reliable authority as to the *quality of education or training offered.*" 20 U.S.C. Sec. 751(f)(5) (emphasis added). Other criteria, consistent with a commitment to secular education, are imposed. 20 U.S.C. Sec. 751(f).

influence in American education. It has elevated the quality of education and has become a powerful instrumentality which sets policies in an area of vital concern to the public. Accreditation has been established in the public mind as a mark of distinction and quality." *Majorie Webster Junior College, Inc.* v. *Middle States Ass'n of Colleges and Secondary Schools, Inc.*, 302 F. Supp. 459, 470 (D. Col. 1969). See also *Parsons College* v. *North Central Ass'n of Colleges and Secondary Schools*, 271 F. Supp. 65 (N.D. Ill. 1967).

Accreditation is a secular process. In a policy statement on institutional integrity adopted in 1966, the Federation of Regional Accrediting Commissions of Higher Education stated:

"By academic tradition and by philosophical principle an institution of higher learning is committed to the pursuit of truth and to its communication to others.

. . .

"A college or university is an institution of higher learning. Those within it have as a first concern evidence and truth rather than particular judgments of institutional benefactors, concerns of churchmen, public opinion, social pressure, or political proscription.

. . .

"Intellectual freedom does not rule out commitment; rather it makes it possible and personal. Freedom does not require neutrality on the part of the individual nor the educational institution — certainly not toward the task of inquiry and learning, nor towards the value systems which may guide them as persons or as schools.

"Hence institutions may hold to a particular political, social, or religious philosophy as may individual faculty members or students. But to

> be true to what they profess academically, individuals and institutions must remain intellectually free and allow others the same freedom to pursue truth and to distinguish the pursuit of it from a commitment to it."

The requirement of accreditation means in effect that whatever else an eligible institution may do, it must offer its students a *secular* education. Finally, to insure that funds allocated are used only for the construction of facilities contributing to the ability of the institution to provide a secular education, facilities used for sectarian instruction or religious worship or in connection with the program of a department of divinity, are expressly excluded.

There is no question that Congress may permissibly seek to further the secular educational objectives of colleges and universities. This Act is plainly structured to that end; the admixture of religion in the curriculum of some schools is thus of no greater constitutional significance here than in *Allen*. That a particular institution may perceive its principal mission as the propagation, teaching, or practice of religion is similarly without constitutional significance so long as in the process it imparts a secular education, in the sense of meeting the criteria of accreditation. Government is not barred from achieving its secular goals because they happen to coincide with those of a sectarian college or university. *Cf. McGowan* v. *Maryland,* 366 U.S. 420, 445 (1961); *Everson* v. *Board of Educ.,* 330 U.S. 1, 18 (1947). Government's concern, moreover, is only with the secular characteristics of the institutions. It follows that involvement with religion in the administration of the statute is at most tangential. The sectarian activities of colleges and universi-

ties remain free either from governmental support or interference. Section 757 of the Act provides, in fact, that:

> "No department, agency, officer, or employee of the United States shall, under authority of this Act, exercise any direction, supervision, or control over, or impose any requirements or conditions with respect to, the personnel, curriculum, methods of instruction, or administration of any educational institution."

To qualify for assistance under the Act, a religiously affiliated college must make the same showing as a secular institution. And to suggest that twenty years of constant surveillance on the part of government will be required to insure that facilities are not devoted to sectarian purposes is factitious. See Brief of Appellants at 42-43. On this theory, government would have to undertake the same course of prolonged surveillance with respect to secular institutions to insure that facilities are not used as gymnasiums or devoted to events for which admission is charged — also forbidden by the Act — or used for some other improper purpose. Evidently Congress believed that reliance on the good faith and representations of the colleges and universities concerned was sufficient; for it prescribed no detailed surveillance or administrative inquiry in the Act itself, and there has been no showing that the Commissioner of Education in fact administers the Act in such fashion, or that there is any necessity for doing so. The eligibility of an institution for assistance under the Act, quite simply, is measured by its secular characteristics. There is no potential for undue involvement or entanglement in this relationship.

The vice of the Act is said to be that it permits funds to be given to institutions where the propagation, teach-

ing, or practice of religion is a meaningful and major part of the total environment. Brief of Appellants at 9. No education, however, is secular in the sense of being value free. Indoctrination goes on in varying degrees and at many levels in the educational life of the individual. Philosophical, moral, and ethical beliefs and teachings are present in many curricula. These are views, in fact, which this Court has suggested may approach the religious in some sense. See *United States* v. *Seeger,* 380 U.S. 163 (1965); *Welsh* v. *United States,* 398 U.S. 333 (1970). Military values permeate the educational processes at the service academies; at some schools athletics are virtually an end in themselves. Other value systems assert the right to weight the environment in which secular education is imparted. But it hardly follows that simultaneous inculcation of any of these values so warps and distorts the curriculum as a whole that an acceptable level of secular learning cannot also be maintained. Sceptics have been bred in Roman Catholic schools, and pacifists at West Point.

It is perfectly clear that there can be differences of opinion over the merit — and the permissibility — of various biases which affect education. The underlying question is what shall be the attitude, in a constitutional sense, toward these differences. Shall religion, collectively, be singled out as the sole system of values which cannot constitutionally weight the educational process? The typical affirmative response seeks to draw support from the specific proscription of an "establishment of religion" in the first amendment. But it is really at that point that inquiry must start, not end. The first amendment says nothing of religion and education, nor does it speak to the permissibility of aiding institutions

of higher education in the construction of academic facilities. As we shall show, it was never thought to be the province of the first amendment to disable government in all its relations with religion, any more than with secular indoctrination of other sorts. With few exceptions this Court has not sought to lay this gloss on the Constitution, nor should it do so now.

It is asserted that the challenged statute must be judged by the strict no-aid-to-religion language of *Everson* v. *Board of Educ.*, 330 U.S. 1 (1947). This language was quoted by the Court in *Walz*, but only as abundantly illustrating the "hazards of placing too much weight on a few words or phrases of the Court." 397 U.S. at 670. This statement is treated by the appellants as of negligible importance. It is submitted that it is, on the contrary, a clear indication that the rigid "no aid" test is not an authoritative gloss on the establishment clause.

The movement by the Court away from absolutist interpretations is in accord with historical evidence bearing on the original meaning of the clause, recently developed by the late Mark DeWolfe Howe. According to Howe, the opinions in *Everson* and certain other establishment clause cases reflected a one-sided view of the complex historical tradition embodied in the first amendment. These interpretations, which Howe characterized as a "leaning tower of absolutes," resulted from an erroneous assumption that the framers of the amendment "spoke in a wholly Jeffersonian dialect." Howe, The Garden and the Wilderness 168, 10 (1965). Howe's thesis was that the American tradition of church-state separation includes not only the Jeffersonian thread, but also the thread running back to Roger Williams. Both Jefferson and Williams wrote

metaphorically of a wall of separation, but they viewed the wall as serving quite different ends. Howe described the Jeffersonian principle of separation as rooted in deistic rationalism and anticlericalism. Church and state should be separated in order to "safeguard public and private interests against ecclesiastical depredations and excursions." *Id.* at 2. Following this view, the Court seemed to have assumed that "the First Amendment intended to keep alive the bias of the Enlightenment which asserted that government must not give its aid in any form to religion lest impious clerks tighten their grip upon the purses and the minds of men." *Id.* at 7.

The title of Howe's book, *The Garden and the Wilderness,* was suggested by a passage from Roger Williams. As Howe explained, "When the imagination of Roger Williams built the wall of separation, it was not because he was fearful that without such a barrier the arm of the church would extend its reach. It was, rather, the dread of the worldly corruptions which might consume the churches if sturdy fences against the wilderness were not maintained." *Id.* at 6. The Williams wall protects churches not only against restraints such as those from which he had personally suffered, but also against the corrupting effects of government support. Williams and his follows believed that "spiritual freedom of churches is jeopardized when they forget the principle of separation." *Id.* at 2.

In Howe's judgment, the first amendment's prohibitions "at the time of their promulgation were generally understood to be more the expression of Roger Williams' philosophy than of Jefferson's. . . . [T]he predominant concern at the time when the First Amendment was adopted was not the Jeffersonian fear that

if it were not enacted the federal government would aid religion and thus advance the interests of impious clerks but rather the evangelical hope that private conscience and autonomous churches, working together and in freedom, would extend the rule of truth." *Id.* at 19.

Williams' hostility to establishment of religion was grounded in his two-fold concept of human freedom in general and of religious freedom in particular. In his view, freedom is not merely an absence of external restraint; more profoundly, it is a condition of spirit. Free exercise of religion is not merely — or primarily — an activity free from hostile discrimination; it is an activity grounded in interior freedom. Legal establishment cannot generate free exercise of religion; what it can do—and what Williams believed it necessarily does — is to destroy the voluntariness of religious observance and render it unfree.

It follows, then, that respect for the Williams tradition of disestablishment does not call for a strict separation of church and state or a proscription of incidental or indirect aid to religion. What the Williams tradition does call for is proscription of aids which sap the vitality of religious freedom. Many indirect aids to religion, however, have no such vitiating tendency. Howe noted, for example, that he found it hard to believe that "Williams and his heirs were so deeply concerned with the maintenance of the wall that they would condemn the tax exemption of churches." *Id.* at 152. In *The Garden and the Wilderness,* Howe did not deal explicitly with the validity of the Act now before the Court. However, in 1961 his views were solicited by Senator Morse in regard to proposed construction loans for private and parochial schools. In his reply,

Howe rejected the view that such loans would be unconstitutional regardless of the use to be made of the buildings. He wrote: "I am satisfied that a valid line can be drawn between governmental support of activities that are predominantly of civil concern and those which are predominantly of religious significance." S. Doc. No. 29, 87th Cong., 1st Sess., p. 51 (1961).

While a rigid "no aid" rule is unjustified, the Jeffersonian thread in our church-state tradition is an effective reminder of the danger which may be present in some attempts to aid religious groups. This danger, as phrased by Justice Harlan in his concurring opinion in *Walz,* is that such attempts may require "that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." 397 U.S. at 694. Such involvement may occur when grants are made on the basis of elaborate and discretionary qualifications which require government officials to become intimately involved in the administration or evaluation of religious agencies.

In the present case, it is not contended that the establishment clause forbids grants to all church-related colleges. Rather, the Court is asked to specify a degree of church relatedness or religious emphasis which will render government aid invalid. Colleges on the wrong side of the line are termed "sectarian"; sectarian institutions are defined as those in which "the propagation, teaching or practice of religion is a meaningful and major part of . . . [their] existence." Brief of Appellants at 9. For the factors upon which to base such a judgment, the appellants rely on the criteria devised by the Maryland Court of Appeals in *Horace Mann League* v. *Board of Public Works,* 242 Md. 645,

672, 220 A. 2d 51, 65-66, *cert. denied,* 385 U.S. 97, (1966). There the court struck down a grant to Western Maryland College because of its "strongly Methodist image" and "flavor." *Id.* at 676-79, 220 A.2d at 68-70. It sustained, however, a grant to Hood College, a liberal arts college sponsored by the United Church of Christ. The religious purposes of Hood were interpreted as "not of a fervent, intense, or passionate nature, but . . . based largely upon its historical background." *Id.* at 672-76, 220 A.2d at 66-68.

The application of the *Horace Mann* criteria entails precisely the sort of involvement and entanglement against which this Court has warned. In *Walz,* Justice Harlan referred to governmental entanglement in "difficult classifications of what is or is not religious . . . ." 397 U.S. at 698. Unlike the process of accreditation, which is primarily an evaluation of the secular educational activities of an institution and which does not in any case involve government, a *Horace Mann* inquisition is concerned solely with an attempt to determine what is or is not religious.

If the *Horace Mann* rule were forced upon Congress and state legislatures, the effect on the character of American higher education would inevitably be away from a vigorous pluralism and toward a bland, secularized religious style. Colleges which have maintained a vigorous religious tradition but which are faced with critical financial problems would be placed under pressure to attenuate their character as religious colleges and treat their religious roots as mere facts of history. The concept of a sectarian institution as applied in *Horace Mann* is a superficial one which should have no constitutional significance. In a more important sense, Hood College is just as sectarian as are the Meth-

odist and Roman Catholic colleges so labeled in *Horace Mann:*

> "the liberal arts college which intends to be educationally serious will also be religiously and morally serious. And to be serious means to commit itself to some answers to the human questions — answers about which there is no universal consensus — answers which can shape its curriculum and its style of life so that the human is enhanced. *Then to be a liberal arts college at all means to be 'sectarian' at least in this sense, that some meanings of the human and the humane are embraced while others are rejected."* Council of Protestant Colleges and Universities, The Church College and the Public Good 7 (1969).

In *Walz,* Justice Brennan wrote of the contributions which religious and nonreligious groups make "to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society." 397 U.S. at 689. These words are reminiscent of an article written by Alexander Meiklejohn in 1949, criticizing the strict wall of separation doctrine expressed in the *Everson* and *McCollum* cases. Meiklejohn, *Educational Cooperation Between Church and State,* 14 Law & Contem. Prob. 61 (1949). With respect to freedom of speech, Meiklejohn was an absolutist.[8] But he saw clearly the stultification inherent in strict separation of church and state. He emphasized that religious and nonreligious citizens in a democratic state need nourishing roots for belief both in democratic values and in the possibility of man's growth in responsible freedom. He noted that for half our people, more or less, religious belief is the source from which democratic institutions derive their

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[8] See Meiklejohn, Free Speech and Its Relation to Self-Government (1948).

moral validity, while for the nonbelievers, himself among them, objects of loyalty must be found "within the human spirit itself." But he noted also that religious sects in the United States "spend quite as much of their energies upon their differences of belief as upon their unity of purpose," while in like fashion nonbelievers, "staggering under the task of finding, within human inspiration itself, an adequate basis for our mode of life, have won . . . no secure forms of cooperation or, even, of mutual understanding." *Id.* at 62-63. In these circumstances, Meiklejohn viewed strict separation of church and state as frustrating the aims of education for citizenship. The question, as he saw it, was

> "How can the many sects, religious and nonreligious, with due regard for the sectarian freedom of each, work together for the promoting of the general welfare? We shall not accomplish that purpose by arranging that, in every way possible, the teaching of our children and adults shall be cut off from our attempts to understand ourselves, our society, and our world." *Id.* at 71-72.

Meiklejohn urged that the question of governmental assistance to independent schools be left to Congress and state legislatures for decision.

It is sometimes argued that all programs of aid to education in religious colleges and schools — even where there is no involvement in the details of planning or administration — must be ruled out in order to avoid political strife and controversy. Such contentions reflect a disparaging view of the health of American religious pluralism in the 1970's, a view dominated by the fear that differences between religious and nonreligious groups can lead only to hostility and strife. It is a

view which is blind to the growth of irenic and ecumenical spirit, a growth which was greatly accelerated by the work of Vatican Council II and its Declaration on Religious Liberty.

The vigorous pluralism of which Justice Brennan wrote in *Walz* is one, we submit, in which differences over religion are not divisive. It is a pluralism which draws its unity from a widely shared belief, not in religion necessarily, but in religious freedom. It is a pluralism in which principal religious and nonreligious groups not only claim freedom for themselves, but affirm equal freedom for others. In such a society individuals can develop internal freedom, which is reflected in tolerance of criticism and openness to new insight. Individuals are free to doubt and to believe. They affirm freedom because they realize the need for dialogue, because individuals and groups have a stake —broadly speaking, a religious stake—in the freedom of others. This pluralism is also one in which there is a sensitivity to the differing needs of different groups and a disposition to accommodate these needs. Such a society obviously will not embody perfection; it may contain groups which do not believe in religious freedom. But it can accommodate this pluralism if such groups are no great threat to freedom, if a trust in the common commitment to religious freedom prevails among the principal groups.

The first amendment protects the freedom of religious belief and unbelief from government sponsorship and government restraint. Under this protection the free pluralism of American society can mature, a pluralism religious and nonreligious. The establishment clause leaves Congress and state legislatures free to foster this pluralism. This Court's decisions have

recognized this freedom; they support the constitutionality of the Higher Education Facilities Act of 1963.

CONCLUSION

For the reasons stated, it is urged that the Court affirm the decision of the court below.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 153

ELEANOR TAFT TILTON, ET AL., APPELLANTS

v.

ELLIOT L. RICHARDSON, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, TERREL H. BELL, ACTING COMMISSIONER OF EDUCATION OF THE UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLEES RICHARDSON AND BELL

OPINION BELOW

The opinion of the three-judge district court (App. 37–67) is reported at 312 F. Supp. 1191.

JURISDICTION

The judgment of the district court was entered on March 19, 1970 (App. 68). The notice of appeal was filed on April 8, 1970 (App. 68). This Court noted probable jurisdiction on June 22, 1970. 399 U.S. 904. The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether Title I of the Higher Education Facilities Act authorizes construction grants to church-related colleges and universities that are eligible to receive them.

2. Whether, if such grants are authorized, the inclusion of church-related colleges and universities as recipients of construction grants for academic facilities on an equal basis with other private and public colleges and universities violates the Establishment Clause or the Free Exercise Clause of the First Amendment.

STATUTE INVOLVED

The major provisions of Title I of the Higher Education Facilities Act of 1963, Pub. L. 88–204, 77 Stat. 363, 20 U.S.C. 701–758, are reproduced as an appendix to appellants' brief.

STATEMENT

This suit presents the question of the validity of aid to church-related colleges and universities under Title I of the Higher Education Facilities Act of 1963, Pub. L. 88–204, 77 Stat. 363, 20 U.S.C. 701–758. Title I provides for grants to assist in construction of certain types of undergraduate academic facilities. 20 U.S.C. 711–712. Appellants are citizens and taxpayers who contend that grants to certain church-related institutions of higher education are not authorized by the Act and violate the Establishment and Free Exercise Clauses of the First Amendment. A three-judge court, convened under 28 U.S.C. 2282 and 2284, rejected

these claims, denied injunctive relief and dismissed the action (App. 67–68).

THE STATUTORY FRAMEWORK

The Higher Education Facilities Act was passed in response to widespread concern over the ability of colleges and universities to expand "to accommodate rapidly growing numbers of youth who aspire to a higher education." 20 U.S.C. 701. It authorizes grants and loans for the construction of undergraduate and graduate academic facilities.

A project is eligible for construction funds[1] under Title I only if it will "result in an urgently needed substantial expansion of the institution's student enrollment capacity, capacity to provide needed health care to students or personnel of the institution, or capacity to carry out extension and continuing education programs on the campus of such institution * * *." 20 U.S.C. (Supp. V) 716.[2] The Commissioner of Education is authorized to prescribe the basic criteria governing construction projects under Title I[3] and is instructed to "give special consideration to expansion of undergraduate enrollment capacity * * *." 20 U.S.C. 717 (a). Priorities among projects are established by state agencies which submit them to the Commissioner of Education for his approval. 20 U.S.C. 715, 719.

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[1] Under Title I, the federal grant may not exceed 50 percent of the cost of the project. 20 U.S.C. (Supp. V) 717(b).

[2] Funds may also be provided to new institutions for creation of urgently needed enrollment capacity. 20 U.S.C. 716.

[3] For the regulatory procedure and criteria, see 45 C.F.R. 170.11–170.19.

The term "academic facilities" is defined to include "structures suitable for use as classrooms, laboratories, libraries, and related facilities necessary or appropriate for instruction of students, or for research, or for administration of the educational or research programs * * * and maintenance, storage, or utility facilities essential to operation of the foregoing facilities * * *." 20 U.S.C. 751(a)(1).[4] The definition specifically excludes "any facility used or to be used for sectarian instruction or as a place of religious worship" or "any facility which (although not a facility described in the preceding clause) is used or to be used primarily in connection with any part of the program of a school or department of divinity * * *." 20 U.S.C. 751(a)(2).[5]

Colleges and universities applying for funds are advised that no part of the project may be used for sectarian instruction, religious worship, or the programs of a divinity school at any time (App. 80) and they must provide assurances to this effect (App. 87–89). Both the state commission and the federal Office of Education review the eligibility of applications on these grounds (App. 80–81, 84–86).

The United States retains a twenty-year interest in any facility constructed with Title I funds. If during this period the applicant ceases to be a public

[4] For purposes of Title I, the term also includes infirmary facilities.

[5] A "school or department of divinity" is defined as "an institution, or a department or branch of an institution, whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation or to prepare them to teach theological subjects." 20 U.S.C. 751(a)(2).

or other nonprofit institution of higher education or the facility is used other than as an "academic facility," the United States is entitled to recover an amount equal to the proportion of its present value which the federal grant bore to the original cost of the facility. 20 U.S.C. 754(b). During the twenty years, the Office of Education attempts to insure that facilities are used in the manner required by the Act primarily by on-site inspections (App. 82–84).

THE PROCEEDINGS BELOW

Appellants brought suit against federal and state officials who administer the Act and four church-related colleges and universities in Connecticut who received construction grants (App. 7–15, 28–36). Funds were used for five projects: (1) a library at Sacred Heart University; (2) a music, drama and arts building at Annhurst College; (3) a science building at Fairfield University; (4) a laboratory at Albertus Magnus College (App. 11–12, 32–33).[4]

Appellants contended that the Act did not authorize grants to these colleges and that, if it did, the Act was unconstitutional. A three-judge court was properly convened and held a plenary hearing on appellants' claims.

Appellants' central contention was that construction grants to "sectarian" institutions, that is, those for

[4] The federal shares were approximately 33 percent (Sacred Heart); 23 percent (Annhurst); eight percent and 34 percent (Fairfield); and one and one-half percent (Albertus Magnus). See App. 11–12.

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which "the propagation, teaching or practice of religion is a meaningful and major part of [their] existence" (Appellants' Brief 7), would violate the Establishment Clause. Cf. *Horace Mann League* v. *Board of Public Works*, 242 Md. 645, 220 A. 2d 51, certiorari denied, 385 U.S. 97. They sought to prove that the four recipient institutions were "sectarian" by introducing voluminous evidence on their relations with religious authorities, the doctrine subscribed to by their personnel, the content of their curricula, and numerous other matters pertaining to their "character."

Appellees' position was that the grants were constitutional so long as the Act and its implementation insured that only the secular, in contrast to the religious, functions of church-related institutions were aided. Stipulations were introduced which detailed the process by which grants are screened, awarded and reviewed (App. 69–91) and the activities of the Connecticut commission which establishes priorities among projects (App. 92–101). Appellee colleges and universities introduced testimony that they had complied fully with the prohibition on the use of federally financed facilities for religious purposes and their religious affiliation did not interfere with the performance of their secular functions (see, *e.g.*, App. 102, 105–106, 108, 110, 115, 118, 120–121).

The district court held that "Congress intended to make the benefits of the Act available to church-related colleges and universities" (App. 43) and re-

jected the argument that the Act violated the Establishment Clause simply because it provided aid to allegedly "sectarian" institutions. Applying this Court's "purpose and effect" test, see p. 16, *infra*, the court further held that "the Act has the secular purpose of increasing the student enrollment capacity of the Nation's institutions of higher education—an existing urgent public need—and that the Act does not have the purpose of promoting religion of any kind" (App. 49).

Recognizing the diverse functions performed by church-related colleges and universities (App. 49–50) and the careful distinction between sectarian and secular facilities made by the Act and maintained in its implementation (App. 50–51), the court found that all the challenged facilities were used "solely for non-religious purposes" (App. 61–66). It concluded, therefore, that the primary effect of the statute was neither to advance nor inhibit religion (App. 51). Finally, because there was no showing that the statute coerced appellants in the practice of their religion, the district court rejected their claim that the Act violated their rights under the Free Exercise Clause (App. 51–52).

SUMMARY OF ARGUMENT

I

Title I of the Higher Education Facilities Act authorizes assistance to church-related colleges and universities for construction of certain academic facilities to be used for secular instruction. The Act

provides grants and loans to qualified "institutions of higher education," without reference to religious affiliation. Extensive discussion in Congress prior to passage of the Act shows it intended to make church-related institutions eligible for assistance under the Act. Rather than exclude church-related institutions, the Act prohibits religious uses of facilities which are partly financed with federal funds.

II

The Act is a governmentally neutral measure which violates neither the Establishment nor Free Exercise Clause. The standard which this Court has adopted for determining whether an enactment violates the Establishment Clause is the "purpose and primary effect" test. The Higher Education Facilities Act has the secular purpose of assisting institutions of higher learning to provide quality education to a rapidly increasing number of students. Congress concluded that church-related institutions provide an adequate secular education and that the need to accommodate more students could not easily be met without permitting qualified church-related colleges and universities to receive assistance under the Act.

The primary effect of the Act is to achieve the goal of providing a secular education. Assistance is provided only for academic facilities to be used in secular instruction. Religion does not permeate the process of secular instruction at the college and graduate level to such an extent that secular and religious functions cannot be treated separately.

The administrative controls designed to insure that academic facilities are not used for prohibited religious purposes do not involve government excessively in the affairs of the church-related colleges and universities which receive assistance. However, the alternative method of insuring that federal funds are not used for religious purposes which appellants suggest—a case-by-case examination of the institution to determine whether it is "sectarian"—would result in the excessive entanglements in the affairs of church-related institutions against which this Court has warned.

The Act, finally, does not violate appellants' rights under the Free Exercise Clause for there is no coercion of religious belief and practice. In fact, by including church-related colleges and universities in the Act, Congress has furthered the values fostered by the Free Exercise and Equal Protection Clauses, while achieving an important public goal.

ARGUMENT

I.

THE HIGHER EDUCATION FACILITIES ACT AUTHORIZES GRANTS TO CHURCH-RELATED COLLEGES AND UNIVERSITIES IN COMMON WITH OTHER PRIVATE AND PUBLIC INSTITUTIONS OF HIGHER EDUCATION

A. THE LANGUAGE OF THE ACT INDICATES AN INTENT TO PRECLUDE AID TO RELIGIOUS FUNCTIONS BUT NOT TO EXCEPT CHURCH-RELATED COLLEGES AND UNIVERSITIES

Congress defined "institutions of higher education," which were to receive assistance under the Act, in an

inclusive, religiously neutral manner. It specified various conditions, among them that the institutions be public or nonprofit, legally authorized by the State to conduct their program and nationally accredited, 20 U.S.C. 751(f), but made no reference to their religious affiliation or non-affiliation.

Congress did expressly provide that facilities constructed with federal funds could not be used for religious purposes, 20 U.S.C. 751(a)(2)(C), (D). Had it desired also to exclude church-related institutions as a whole from the benefits of the Act, it would similarly have done so expressly. In fact, exclusion of religious uses apparently was considered an alternative to complete exclusion of church-related institutions as a means of meeting the requirements of the Establishment Clause. See 109 Cong. Rec. 19218.

B. THE LEGISLATIVE HISTORY OF THE ACT SHOWS THAT CONGRESS INTENDED TO INCLUDE CHURCH-RELATED COLLEGES AND UNIVERSITIES

Congress conducted extensive hearings [7] and debates prior to passage of the Higher Education Facilities Act in 1963. It was acutely aware of the urgent need for immediate growth in the enrollment capacity of the nation's colleges and universities and concluded that the need could best be met by providing aid to

[7] See *Hearings Before the House Committee on Education and Labor on H.R. 3000 and Similar Bills to Strengthen and Improve Educational Opportunities in the Nation*, 88th Cong., 1st Sess. (hereinafter cited as *House Hearings*); *Hearings Before the Senate Subcommittee on Education of the Committee on Labor and Public Welfare on S. 8, S. 580, S. Res. 70 and others*, 88th Cong., 1st Sess.

all qualified institutions of higher education, regardless of their religious affiliation.

It was estimated that college enrollment would increase from 3.6 million in 1960 to 7 million in 1970 (S. Rep. No. 557, 88th Cong., 1st Sess., p. 2) and to 8.6 million by 1975. *House Hearings,* 478. Existing facilities were inadequate even for 1963 enrollment. Approximately eleven percent needed replacement, while another eight percent required rehabilitation, to meet current standards. 109 Cong Rec. 14953. Fewer than 100 institutions had adequate library facilities. 109 Cong. Rec. 14955; see, also, *House Hearings,* 560. Only five percent of all campus libraries could seat more than one-sixth of their potential users. 109 Cong. Rec. 19403.

Replacement or renovation of existing facilities would require approximately $12.9 billion by 1970. 109 Cong. Rec. 14953. To accommodate the projected increase in enrollment would require $23 billion for new facilities, more than three times the amount spent on buildings in the 1950's. 109 Cong. Rec. 14965. By 1980, it would be necessary to double the size of every existing college and university in the United States and in addition to establish 1,000 new institutions with an average enrollment of 2,500 students. 109 Cong. Rec. 19217.

Annual expenditures from the traditional sources of college and university revenue—endowment, tuition, grants, alumni contributions and state aid—were expected to be fully one billion dollars a year less than would be needed for new facilities. Congress therefore drew the obvious conclusion that a "gap

remains * * * which the Federal Government * * * in recognition of the importance of higher education to our security and welfare, must necessarily fill." 109 Cong. Rec. 14965. It was equally apparent that a program of aid to public institutions alone would not suffice, for "public institutions are insufficient in number to handle the load of students at the college and graduate levels." 109 Cong. Rec. 14954. Senator Ribicoff predicted, for example, that "if we swept away the opportunity for the growth of our private colleges, be they sectarian or nonsectarian, there would be a fantastic collapse of education in the United States," *id.* at 19495. See also *id.* at 14963, 14973, 14955, 19890; *House Hearings*, 311, 537.[8]

A number of factors make it clear that Congress, when it decided to include private colleges and universities among the Act's beneficiaries, intended to include those which were church-related, as well as those

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[8] There were 2,100 institutions of higher learning in the United States in 1962. Of these, 1,357 were privately controlled (515 independent, 842 church-related) and 743 were public. 109 Cong. Rec. 14954. The percentage of degree-granting institutions which are private is even greater. *House Hearings*, 311. The majority of church-related institutions were affiliated with Protestant denominations, a sizable minority with the Catholic church, and a handful with other faiths.

A study of church-sponsored institutions sponsored by the Danforth Foundation revealed that in 1965 they had an enrollment of slightly more than one million, one-sixth the total number enrolled in institutions of higher learning. Church-sponsored institutions awarded approximately one-fourth of the degrees conferred. Pattillo & MacKenzie, *Church-Sponsored Higher Education in the United States* 26 (1966).

which were not. Although there was much debate on the wisdom and constitutionality of aid to church-related institutions (see, *e.g.*, 109 Cong. Rec. 14945, 14963, 19218, 19381–84, 19400–01, 19467–81, 19483–84, 19488, 19494–95, 19877–88, 19879, 19887–88), the clear indication was that the Act included them. Sponsors of the measure so stated (*e.g., id.* at 14954 (Rep. Powell), 14963 (Rep. Quie), 19218 (Sen. Morse)) and amendments designed to exclude them were proposed and rejected in both the House and Senate. *Id.* at 14990–92, 19496. The Senate bill permitted grants for construction only of libraries and buildings for natural and physical sciences and engineering in the belief that assistance to church-related institutions which was limited to these types of facilities could more easily be defended against constitutional attack. 109 Cong. Rec. 19218, 19401.[9] Finally, the express prohibition on religious uses of facilities would have been largely unnecessary if the expectation had been that church-related institutions were to be completely excluded.

C. THERE IS NO OCCASION FOR A LIMITING CONSTRUCTION

In the face of strong evidence in the language and legislative history of the Act that Congress intended

[9] The final bill was a compromise which permitted assistance for construction of libraries and facilities for only the natural sciences, mathematics, modern foreign languages and engineering. H. Conf. Rep. No. 884, 88th Cong., 1st Sess. in 1963 U.S. Code Cong. & Admin. News 1199–1200. These categorical restrictions were subsequently eliminated by amendment. Pub. L. 89–329, § 701(a), 79 Stat. 1266.

to permit grants to church-related institutions, appellants seize on the fact that Congress did not expressly include them to suggest that this Court should construe the Act to exclude them "in the candid service of avoiding a serious constitutional doubt." *United States* v. *Rumely,* 345 U.S. 41, 47. As we show below, the doubts as to the constitutionality of this statute are insufficient to warrant invoking this doctrine. Moreover, a limiting construction would be inappropriate in this case because it is "barred by intellectual honesty." *Ibid.*

Congress' decision to include church-related institutions was well-considered and unambiguous. It had debated the constitutionality and wisdom of aid to church-related colleges and universities in previous sessions. A broader bill had failed of passage the preceding year. When the 1963 bill was proposed, the issues were extensively debated and the facts and opinions of experts were thoroughly explored.[10] Congress developed a narrowly drawn program to meet the pressing problems created by inadequate facilities and expanding enrollment. Aware of possible constitutional problems, it made a deliberate decision to exclude no class of institutions of higher education from that program, and instead developed appropriate

[10] There is thus no support for a limiting construction on the theory that this judicial technique is an appropriate means to provide Congress with the opportunity for sober reconsideration of a decision made in the first instance without "full and measured thought." Freund, *The Supreme Court of the United States* 180 (1961); see *Bickel, The Least Dangerous Branch* 165-166 (1962).

safeguards, such as the prohibition on religious uses, to avoid these problems.[11]

II

THE HIGHER EDUCATION FACILITIES ACT IS A GOVERNMENTALLY NEUTRAL MEASURE WHICH PROMOTES VALID PUBLIC POLICIES WITHOUT VIOLATING EITHER THE ESTABLISHMENT OR FREE EXERCISE CLAUSE

The combined effect of the Establishment and Free Exercise Clauses—"both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other," *Walz* v. *Tax Commission*, 397 U.S. 664, 668–669—is to forbid government favoritism or hostility toward religion but also to afford a measure of discretion for action which affects religion without unduly impinging upon the values protected by the Religion[s] Clauses. "The general principle * * * is * * * that we will not tolerate either governmentally established religion or government interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality." *Id.* at 669. See *Zorach* v. *Clauson*, 343 U.S. 306, 314. The Higher Education Facilities Act is a careful and proper exercise of the discretion permitted by the Religion[s] Clauses through which Congress has sought

[11] It was felt that the "bricks and mortar" approach of the bill would itself lessen constitutional doubt since buildings and other facilities are quite neutral forms of assistance which do not easily or successfully lend themselves to the blending of secular and religious aspects of church-related education. See 109 Cong. Rec. 14955.

to achieve the important goal of enlarging the enrollment capacity of this nation's colleges and universities, while maintaining a "benevolent neutrality" toward religion.

A. THE ACT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE BECAUSE ITS PURPOSE AND PRIMARY EFFECT ARE SECULAR

The standard which this Court has adopted to determine whether various involvements of government with religion violate the Establishment Clause is the "purpose and effect" test. *E.g., McGowan* v. *Maryland,* 366 U.S. 420; *Abington School Dist.* v. *Schempp,* 374 U.S. 203; *Board of Education* v. *Allen,* 392 U.S. 236, 243. See, also, Valente, *Aid To Church-Related Education—New Directions Without Dogma,* 55 Va. L. Rev. 579, 585–587 (1969). The statement of the test which was articulated in *Schempp,* 374 U.S. at 222, was recently reiterated by this Court in the context of state financial aid to church-related schools in *Allen,* 392 U.S. at 243:

> "[W]hat are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and primary effect that neither advances nor inhibits religion. * * *"

This test was properly applied by the court below.

1. The Purpose of the Act Is to Assist Construction of Needed Facilities for Secular Instruction

There can be no serious dispute that Congress' purpose in passing the Higher Education Facilities Act was secular. The findings and declaration of policy of the Act indicated Congress' view that "the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education." 20 U.S.C. 701.

Congress was aware of the large number of private and church-related colleges and universities without which the urgent need for growth could not easily be met.[12] It was also aware of the important secular role these institutions have traditionally played in training of technical and professional personnel and the development of an educated citizenry. It purposely

[12] That the secular goal of Title I could not easily be met without participation by church-related institutions suggests that the standard that the government may not "use essentially religious means to serve governmental ends where secular means would suffice," *Abington School Dist.* v. *Schempp*, 374 U.S. at 231 (concurring opinion of Mr. Justice Brennan), would not be violated in this case even if aid to the secular functions of church-related colleges were considered an "essentially religious means."

included them under the Act because of the contribution they could make toward achieving secular goals. At the same time, it expressly excluded religious use of facilities which would be constructed, because such use would not help to meet these secular goals.

2. The Primary Effect of the Act Is to Achieve Its Secular Goal

The fundamental objection of appellants is to the effect of the Act. Grants for construction of buildings surely aid church-related colleges and universities just as "making textbooks available to pupils in parochial schools," in *Allen* assisted churches by relieving them "of an enormous aggregate cost for those books." *Walz* v. *Tax Commission,* 397 U.S. at 671–672. However, the *primary* effect of the challenged assistance, as the court below found, is to help in providing a secular education, just as the loan of secular texts in *Allen* had the primary effect of achieving that goal.

The problem in determining the primary effect of financial aid to church-related schools is that they "pursue two goals, religious instruction and secular education." *Board of Education* v. *Allen,* 392 U.S. at 245. The court below properly emphasized on the goal toward which the aid was directed. Finding that the aid was in fact used exclusively to assist the colleges in their secular capacity, the court held that the primary effect of the Act was secular and that any incidental benefits to their religious activities were constitutionally permissible. Cf. Choper, *The Establishment Clause and Aid to Parochial Schools,* 56 Cal. L. Rev. 260, 287–290 (1968).

Appellants do not dispute that aid is directed only at the overtly secular activities of church-related colleges. Nor do they contend that no church-related institution may receive aid. Their argument is that only those church-related institutions for which "the propagation, teaching or practice of religion" is so significant as to render them "sectarian" are constitutionally ineligible. The merit of this argument depends critically on the validity of one proposition: that religiosity so permeates the teaching of secular subjects at "sectarian" institutions that their religious and secular functions are inseparable. If this is true, it is contended that the primary effect of any aid, regardless of the function toward which it is directed, is the advancement of religion.

This proposition was suggested in the debate in Congress (109 Cong. Rec. 19474–75), and rejected. This Court recently rejected it in the context of elementary and secondary schools, relying upon the fact that a "wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education." *Board of Education* v. *Allen,* 392 U.S. at 248.

The prospect that the educational process at the college level is so permeated with religion that secular and religious functions cannot be treated separately seems even more remote than at the elementary and secondary level. The "affirmative, if not dominant,

policy" of church-related elementary and secondary schools is "to assure future adherents to a particular faith by having control of their total education at an early age." *Walz* v. *Tax Commission*, 397 U.S. at 671. The more mature student at the church-related college or university is obviously less susceptible to inculcation of religious beliefs by use of a controlled atmosphere "since either his basic religious personality has already been formed or it can be influenced successfully only by stimulating the student to acquire understanding and insight which persuade him to accept certain religious teachings." Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 583 (1968). See, also, Freund, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1691 (1969). The more rigorous academic requirements at the college and graduate school level further insure against permeation of secular instruction and research with religious dogma. The various secular subjects impose their own discipline which precludes introduction of irrelevant religious viewpoints and fosters consideration of relevant religious matters in a spirit of free inquiry. As Senator Prouty declared in the debate in Congress, "[t]here is no such thing as a Catholic version of economics, a Jewish version of the Russian language, and a Protestant version of political studies." 109 Cong. Rec. 19487.

The evidence before the court below in this case demonstrates that secular activities of the appellee institutions were pervaded by an atmosphere of aca-

demic freedom rather than by one of religion. *E.g.*, App. 111–112. While appellants' original tactic was to demonstrate that these recipient institutions were sectarian, they now offer a hypothetical institution as the basis for decision (Appellants' Brief, pp. 10–11). Adjudication of the constitutionality of an Act of Congress on this basis is, however, singularly inappropriate. *United States* v. *Raines*, 362 U.S. 17, 21; *United States* v. *Petrillo*, 332 U.S. 1, 9–12.

There is, of course, wide variety among church-related institutions of higher learning. See, generally, Pattillo and MacKenzie, *Church-Sponsored Education in the United States* (1966). Unlike denominational elementary and secondary schools, the great majority of which are Roman Catholic, church-related colleges and universities are widely spread among faiths.[13] There are, moreover, differences in the degree of importance of religion at these institutions. The four appellee colleges may thus not be a fully representative sample. But they provide a better basis for this Court's review than a hypothetical institution the actual existence of which is vouchsafed only by appellants' assurance that they have "no doubt there are many." [14]

[13] See note 8, *supra*, p. 12.

[14] Appellants apparently offer as an alternative standard for determining whether financial assistance to church-related institutions would violate the Establishment Clause the "no subsidization" principle of *Everson* v. *Board of Education*, 330 U.S. 1, as limited by the "child-benefit" theory (Appellants' Brief, pp. 11, 16–20). Direct subsidies, such as those involved here, would not be constitutionally permissible. However, benefits provided in a religiously neutral manner to all children

B. THE ADMINISTRATION OF THE ACT DOES NOT EXCESSIVELY ENTANGLE GOVERNMENT IN THE RELIGIOUS AFFAIRS OF THE CHURCH-RELATED COLLEGES AND UNIVERSITIES

In addition to considering whether the purpose or primary effect of a governmental measure is impermissibly to advance or inhibit religion, it is necessary to determine whether it results in "an excessive governmental entanglement with religion." *Walz* v. *Tax Commission,* 397 U.S. 664, 674. The administrative relationships between government and religion at issue in this case are not excessive. They are surely no greater than those resulting from the loan of textbooks which this Court in *Allen* refused to declare an "unconstitutional involvement of the State with religious instruction." *Board of Education* v. *Allen,* 392 U.S. at 248. In fact, they approach the minimum involvements which are necessary to insure that aid to religious schools is employed in secular activities.

In *Walz,* where this Court recently applied the "excessive entanglement" standard with regard to governmental financial assistance to religion, it commented that

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or parents such as textbooks (*Allen*) or bus rides (*Everson*) which indirectly aid the church-related institution would be allowed. While the child-benefit theory may be helpful as one tool for analyzing the constitutional problems raised by certain programs, it should not substitute for a realistic examination of the effect—direct or indirect—of financial assistance. It ignores the fact that aid to either the school or the child assists both. Moreover, it does not provide a universally practical standard for limiting the no-aid principle of *Everson*, for virtually any aid can be cast in a form which aids the student directly and the school only indirectly.

"[o]bviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards." 397 U.S. at 675.

Although a direct subsidy is involved here, it is in the form of a specific, limited-purpose, one-time grant, which does not involve the kind of "sustained and detailed administrative relationships" to which the Court referred. The application process itself involves insignificant contact with the institution and none with its religious functions. The government's concern is only with the need and ability of the institution to expand its enrollment. Beyond obtaining the assurance that the facilities will not be used for religious purposes and making certain that the institution meets neutral criteria, such as that it is accredited, the government does not—and cannot by statute—become involved in "the personnel, curriculum, methods of instruction, or administration." 20 U.S.C. 757.

During the twenty-year period in which the government retains an interest in the facility, its contact with the institution is superficial and slight. The primary supervisory device is the on-site visit. Because only use of buildings is involved, compliance with the conditions of aid ordinarily may be determined by such methods as a physical tour and examination of class schedules (App. 82–83).

The alternative to this simple system which appellants' position requires would result in far greater

government involvement with religion. Since they do not contend that government may not aid any church-related college or university, it would become necessary to determine in each case whether an institution is nonsectarian and therefore eligible. The government would have to engage in a detailed examination of the institution and its relationship with its affiliated church.

Ranking institutions along a scale of sectarianism would not only be difficult but could lead to theological disputes among religious institutions competing for funds, which the government would inappropriately have to resolve. See *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440. It might have to inquire into the beliefs and religious affiliation of administrators, teachers and students, as appellants did at the trial in this case (*e.g.,* App. 109), and the instructional practices at the institution. Cf. *Sweezy* v. *New Hampshire,* 354 U.S. 234. A standard of sectarianism would, finally, place a premium on secularism, for it would create a financial incentive to de-emphasize religion in order to qualify for federal funds.

This Court refused to enter into comparable inquiries in *Walz,* where one argument for tax exemptions for churches was that they performed "social welfare services or 'good works' * * * family counselling, aid to the elderly and the infirm, and to children." 397 U.S. 674. Noting that churches varied in the extent of their social services, this Court concluded that "[t]o give emphasis to so variable an as-

pect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." 397 U.S. at 674. An across-the-board tax exemption, on the other hand, avoided these entanglements.[15] They are similarly avoided in this case by providing assistance to eligible colleges regardless of their religious affiliation, while insuring that the assistance will not be used for religious purposes.

C. THE ACT DOES NOT VIOLATE APPELLANTS' RIGHTS UNDER THE FREE EXERCISE CLAUSE

Appellants also claim that the Higher Education Facilities Act restricts their free exercise of religion, solely because it compels them to pay a tax allegedly for the support of religion. This claim is wholly in-

[15] Appellants contend that aid to church-related colleges, in contrast to tax exemptions, is not an historical tradition but an innovation. Appellants' Brief, pp. 48–50; see *Walz* v. *Tax Commission*, 397 U.S. at 678–680. However, Congress has permitted church-related institutions to participate in general aid programs to colleges and their students for more than a century, beginning with the Morrill Act which established land-grant colleges. 109 Cong. Rec. 19382–19383. In the period following World War II, Congress has established programs to provide aid for a variety of educational purposes. Funds are made available through the National Defense Education Act, the National Science Foundation, the National Institutes of Health, the Atomic Energy Commission and the National Aeronautics and Space Agency for equipment, fellowships, and research without distinguishing between public and private or church-related and non-church-related institutions of higher education. See 109 Cong. Rec. 19383–19384, 19402, 19478, 19885, 19890.

substantial, for it is well-settled that the Free Exercise Clause may only be invoked where there is some coercion in the practice or exercise of religion. *Board of Education* v. *Allen,* 392 U.S. 236, 248–249; *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222–223. There is no such coercion in this case.

D. THE ACT FURTHERS VALUES FOSTERED BY THE FREE EXERCISE AND EQUAL PROTECTION CLAUSES

If Congress had decided to exclude church-related colleges and universities from the benefits of the Higher Education Facilities Act, a challenge by such institutions to the constitutionality of that exclusion on the basis of the Free Exercise and Equal Protection Clauses might have been made. As Senator Keating argued in the debate in Congress, "the constitutional question would be raised not by the inclusion of religiously owned or operated institutions, but rather by the exclusion of such institutions from a program of across-the-board assistance for higher education." 109 Cong. Rec. 19489. Cf. *Sherbert* v. *Verner,* 374 U.S. 398; *Torcaso* v. *Watkins,* 367 U.S. 488; Kauper, *Religion and the Constitution* 110 (1964). While we do not contend that inclusion of these institutions was required by these Clauses any more than it was forbidden by the Establishment and Free Exercise Clauses, we do believe that their inclusion was a wise legislative choice which advances the values that the concepts of freedom of religion and equal protection are designed to protect.

There are numerous examples of measures, neither compelled nor forbidden by the Religions Clauses, which benefitted religion when they were taken but might have harmed it if they had not been. In *Everson* v. *Board of Education,* 330 U.S. 1, 16, this Court stated that the State could include parochial students in its general program of free bus transportation to school or exclude them from it without transgressing constitutional bounds. The Court acknowledged that including them in the program lent some assistance to religion but also stressed that it furthered free exercise and was consistent with the principle of equal treatment. See, also, *Board of Education* v. *Allen,* 392 U.S. at 244; Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* 139 (1965). Similarly, the Constitution does not require States which have Sunday closing laws to exempt Sabbatarians, although it permits them to do so. *Braunfeld* v. *Brown,* 366 U.S. 599, 608 (opinion of Chief Justice Warren). Tax exemptions for churches were upheld as a valid measure, within the discretion of the legislature, which spares "the exercise of religion from the burden of property taxation." *Walz* v. *Tax Commission,* 397 U.S. 664, 673. See, also, *Zorach* v. *Clauson,* 343 U.S. 306, 314; *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 306 (concurring opinion of Mr. Justice Goldberg).

In this case, a decision by Congress to exclude church-related colleges from the Act would have

made achievement of the Act's goals of rapid expansion of college enrollment capacity more difficult. It would also have seriously weakened the ability of church-related schools to provide a quality education, or at least it would have reduced their relative importance among institutions of higher learning by channelling literally billions of dollars solely to non-church-related institutions.[16] The consequent creation of a permanent underclass of church-related colleges would have compelled students who preferred an education at such an institution to forsake their preference or the quality of their education. Cf. *Pierce* v. *Society of Sisters,* 268 U.S. 510. Congress chose wisely instead to honor the principles of free exercise and equal protection by including church-related colleges and simultaneously taking pains to guarantee that aid to them would be used only for secular purposes.

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[16] The first authorization was of $230 million for fiscal 1963, a figure which arose steadily each year to $936 million for fiscal 1970. 20 U.S.C. (Supp. V) 711(b).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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No. 153

Vide No. 89. for Motion and brief of National Jewish Comm. on Law and Public Affairs, et al.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 153

ELEANOR TAFT TILTON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RAISNER, ELISABETH R. SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANSHARD, JAY S. ROTH, CARL W. SCHAEFER, NORMAN T. DAVID, HERBERT T. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PENDLETON,

Appellants,

—v.—

ELLIOT L. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY, ALBERTUS MAGNUS COLLEGE,

Appellees.

ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF FOR APPELLANTS

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In the

Supreme Court of the United States

October Term, 1970

No. 153

Eleanor Taft Tilton, Mildred H. Clark, Carol D. Goldstone, Theodore Gurney, Harvey L. Raisner, Elisabeth R. Swain, Wyman W. Parker, Paul A. Reynolds, Rufus Blanshard, Jay S. Roth, Carl W. Schaefer, Norman T. David, Herbert T. Goldstone, James W. Gardner, Jr., Charles L. Pendleton,

Appellants,

—v.—

Elliot L. Richardson, Secretary of the United States Department of Health, Education and Welfare, James E. Allen, Jr., Commissioner of Education of the United States, Marvin K. Peterson, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, Sacred Heart University, Annhurst College, Fairfield University, Albertus Magnus College,

Appellees.

ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF FOR APPELLANTS

1. The Questions Presented

Rule 40(h)(3) of this Court authorizes appellees to rephrase "the questions presented" if they are dissatisfied with the appellant's version. It was, however, not contem-

plated thereby that the rephrased question would be one the answer to which all sides agree. The Government's Brief (p. 2) states that the questions presented herein are whether the challenged statute "authorizes construction grants to church-related colleges and universities that are eligible to receive them," and if so, whether the inclusion of "church-related colleges and universities" violates the Constitution.

The Brief of the Appellee Colleges (p. 2) is even more precise in formulating the "questions presented." It asks whether institutions can be excluded "solely" because they are "church-related."

If these were the questions presented by this appeal, there would be no appeal. Throughout the proceedings in the court below and in our Brief to this Court (p. 9 and *passim*), we sought, apparently unsuccessfully, to make clear that we do not now nor have we ever contended that mere church-relationship disqualifies an institution either statutorily or constitutionally from receipt of governmental funds. Nor did the District Court hold only that church-relationship itself is not sufficient to disqualify colleges from the benefits of the statute. It went far beyond that and held that any religious institution (other than a divinity school) is eligible no matter what role religion plays in its control, purpose or operations. It is from this *carte blanche* that we appeal.

2. Church-Relationship and Sectarianism

We have used the term "sectarian" to designate the educational institutions we believe to be statutorily and constitutionally disqualified. We used that term to indicate one in which "the propagation, teaching or practice of religion is a meaningful and major part of its existence." Had we commenced this suit before the Court's decision in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970) we might have used the definition in that case, i.e., one whose "dominant policy" is "to assure future adherents to a particular faith by having control of their total education at an early age." (90 S. Ct. at 1412-1413)

We used the term "sectarian" because it is the one most commonly used in constitutions, statutes and judicial decisions in the context involved in the present case. Of the fifty state constitutions in the Union, no less than 33 use the term "sectarian" in provisions barring financing of such educational institutions. Others use the term "religious" or "denominational."[1] None uses the term "church-related." Even the statute here in issue uses the word "sectarian" (20 U.S.C. 751(a)(2)), but not "church-related." There are many court decisions defining "sectarian"; most relevant here are *Horace Mann League* v. *Board of Public Works,* 242 Md. 645 (1966) and *State ex rel. Warren* v. *Reuter,* 170 N.W.2d 790 (1969). We have not found any defining "church-related."

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[1] The constitutional provisions are collated in the U.S. Department of Health, Education and Welfare, Office of Education, *The State and Nonpublic Schools* (1958).

In view of these facts we considered it quite reasonable to use the word "sectarian" to designate the type of educational institution we deem statutorily and constitutionally ineligible to receive governmental funds.

3. The Profile of a Sectarian College

In our initial Brief (pp. 10-11) we set forth as a "composite description of a sectarian educational institution" one "which admits only students of a particular religion, requires them to participate in religious activities, compels them to comply with the doctrines and dogmas of the religion, forces them to attend church, requires them under penalty of dismissal to take instruction in the theology and doctrines of the religion, and does everything to propagate and advance a particular religion other than confer degrees in divinity * * *."

We stated (*ibid.*) that "We do not contend that any of the four institutional defendants herein fit the above composite description of a sectarian educational institution." We did not make the contention first, because the District Court had made no findings of fact one way or the other on the nature of the institutions, and secondly because the Court had adopted the Government's position that even if the defendant institutions did fit the composite description they would still be eligible to receive governmental funds and therefore refused to enjoin the Government from so applying the statute.

Nevertheless, the defendant colleges vigorously denied that any of them fit the composite description, and have included as an appendix to their Brief the proposed findings of fact submitted by them to the District Court setting forth their description of themselves as they contend it is.

It is difficult for us to appreciate the probative value of proposed findings of fact upon which the trial court did not act. But to make our own position clear, we state that while we do not contend that any of the defendant colleges now fit the composite description we have set forth, neither do we concede that none of them substantially fitted the description when the grants to them were approved by the Government. On the contrary, we believe that the District Court could well have found on the basis of the evidence before it that one or more of the defendant colleges did fit the description at that time.

One of the most strongly contested issues before the District Court was whether the eligibility of an institution should be determined by its character at the time the grant to it was approved by the Department of Health, Education and Welfare or at a later time. The plaintiffs took the position that since the suit was basically for an injunction and declaratory judgment in respect to the nationwide application of the statute, the critical date was the one on which the challenged grants were approved by the Department. The college defendants, on the other hand, contended that changes in the character of the beneficiary institutions which occurred up to the trial, and indeed even those which had not yet taken place but were planned or contemplated (see Appellee Colleges Brief, p. 4a footnote 10) must be considered in determining eligibility. For that reason much, perhaps most of the evidence and witnesses presented by the colleges related to the situation as it existed at the time of trial rather than at the time the grants to them were approved.

In view of the position taken by the District Court, i.e., that the character of the institution is immaterial in deter-

mining eligibility, the contested legal question was not decided. Although the plaintiffs throughout the trial maintained a continuous objection to all post-approval evidence, the proposed findings of fact submitted by the colleges and incorporated in their Brief herein makes no distinction between pre- and post-approval evidence.

At the conclusion of the trial, the plaintiffs in their post-trial memorandum presented to the District Court a profile of each of the defendant colleges based upon evidence and testimony submitted at the trial. In view of the District Court's decision—a functional equivalent of sustaining a demurrer—these factual profiles must be taken to be true, and hence are far more appropriate for consideration by this Court than the unacted-upon proposed findings of fact submitted by the defendant colleges. Accordingly, for the convenience of this Court, we are submitting as an appendix to this Brief, the profiles of each of the defendant colleges as we submitted them to the District Court. We do this without conceding in the slightest that if the character of the defendant colleges were and are as indicated by their proposed findings of fact they would be either statutorily or constitutionally eligible for grants under the Act.

4. The Test of Time

In our initial Brief (p. 48) we stated that "From the disestablishment of churches at the end of the 18th and the beginning of the 19th centuries until the enactment of the statute challenged herein neither the Federal government nor any state has directly subsidized the construction or operations of *sectarian* educational institutions." (Emphasis added.) The Government, in its Brief (p. 25, foot-

note 15), citing this part of our Brief, states that we "contend that aid to *church-related* colleges, in contrast to tax-exemptions is not an historical tradition but an innovation." (Emphasis added.) The Government's Brief then indicates that we are mistaken because "Congress has permitted *church-related* institutions to participate in general aid programs to colleges and their students for more than a century, beginning with the Morrill Act which established land-grant colleges. 109 Cong. Rec. 19382-19383." (Emphasis added.)

In view of the position we have taken throughout this litigation, our taking exception to this substitution of "church-related" for our "sectarian" can hardly be deemed semantic quibbling. On the contrary a mere glance at the institutions listed in the city authority for the Government's assertion (109 Cong. Rec. 19382-19383) supports our position and shows that not one of them is now or at the time it received Morrill Act benefits was a *sectarian* educational institution, and that many if not most of them could be deemed to have been church-related only by the most liberal interpretation of that term. The following is the complete list of the institutions named in the *Congressional Record*:

Brown University
Yale University
Rutgers University
Dartmouth University
University of Kentucky
University of Delaware
Atlanta University
Maryland State College
Auburn University
Kansas State University
University of California

We respectfully refer the Court to the two cited pages of the *Congressional Record* which set forth after each institution a short explanatory statement indicating its church-relatedness. For the Court's convenience we quote one which we believe to be typical.

> Kansas State University: Methodist Church gave Bluemont Central College to State as site for new agricultural college which was to receive land-grant funds. This "Kansas State Agricultural College" became the State University. (109 Cong. Rec. 19383)

If this comment indicates anything it is a recognition that Bluemont Central College could *not* receive land-grant funds so long as it was part of the Methodist Church, and accordingly it was transferred for that purpose to the State of Kansas and became the State University.

We submit that the authority cited by the Government supports our position, not the Government's. We add only that if all the beneficiaries of the Higher Education Facilities Act as interpreted and applied by the Department of Health, Education and Welfare were as "church-related" as Kansas State University, we would not be in court today.

Respectfully submitted,

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February, 1971

APPENDIX

APPENDIX

Profiles of Defendant Colleges

1. *Annhurst College*

Annhurst College is a Catholic liberal arts college for women, operated under the auspices of the Order of the Sisters of the Holy Ghost, a Catholic order. It was founded in 1941 with the approval of the Catholic Bishop of Connecticut and was incorporated in 1943 by a Special Act of the Connecticut General Assembly which stated works of religion among its purposes and for property to be held by the corporation as trustee in behalf and for the benefit of the members of the religious community residing within the institution. Its original facilities were constructed with funds provided by the Order.

The Board of Trustees, the designated governing body, is entirely under the effective control of the Order. Its officers are four in number and are such by virtue of their official positions in the Order. Until very recently, there were also four appointed members, who were also required to be members of the Order. In 1967, and again in 1969 (after the operative date of the grant challenged in this action), the By-laws were amended to enlarge the number of appointed members and permit nonmembers of the Order, so that two Catholic laymen have been added; but even after these amendments, *all* members must be appointed annually by the Provincial Superior, who is the Chairman of the Board of Trustees *ex officio*. All five officers of administration are members of the Order, as are almost one-half of the faculty; all such faculty mem-

bers, including the President, were assigned to Annhurst by the Provincial Superior and all are subject to reassignment elsewhere by her at any time. Some fifteen of the approximately twenty-five lay members of the faculty are Catholics. It is affiliated with the National Catholic Education Association.

Of the four hundred students, about three hundred and eighty, or 95%, are Catholics. The application form for admission asks for the religion not only of the student but of both parents. Catholic student organizations are prominent on the campus, and the two honor societies are both Catholic. The students consider that theirs is a Catholic student body and that theirs is a Catholic campus. Included in the student body are about a dozen novices and five Sisters of the Order, which provides their education so that they will become teaching members of institutions operated by the Order.

The Board of Trustees cannot issue notes or bonds, or sell any of Annhurst's assets, except with the written approval of the Provincial Superior. If the corporation is dissolved, its assets will be transferred to the Order for its charitable purposes, presumably including facilities constructed with the assistance of public funds.

The college has a Catholic chapel, located in one of the dormitories, and a Catholic chaplain, but no Protestant or Jewish chapel or chaplain. Students are urged, although not required, to attend daily Mass, and a closed retreat is provided for all students once a year. Six Catholic feast days are celebrated each year on campus, one being required for all Catholic students at the beginning of each academic year. All classrooms and all bedrooms have crucifixes, and there are other Catholic religious symbols and statues on the campus. Priests on the faculty start

their classes with a prayer, although this is not compulsory. Nuns and Priests wear the habit of their Order or clerical garb on campus. Four three-credit courses in Theology are required for graduation, three compulsory and one elective, and of the seven Theology courses offered in the curriculum, six have a primarily Catholic content. The Theology faculty consists entirely of two Priests. The head of the Philosophy Department is a Sister of the Order, and one of the other two faculty members is a Priest. Significantly, of four witnesses produced by Annhurst, not one was on the Theology or Philosophy faculty, even though they had been listed as prospective witnesses by counsel. Faculty members are not free to disseminate doctrines

> subversive of the basic principles of American freedom and government or of the aims and purposes of the College as a Catholic institution . . . .

Annhurst's student handbook lists some five nearby Catholic churches, but no Protestant churches or Jewish synagogues. Its solicitation for funds and flyers are couched in terms of its being Catholic. It has the image of a Catholic institution.

2. *Albert Magnus College*

The College was founded by the Dominican Sisters in 1925 with the "approval of" the Archbishop of Hartford, and named for St. Albert the Great, a renowned Dominican teacher. The College Seal contains the seal of the Dominican Order. In January, 1965 the College applied for a Federal grant for two language laboratories which was approved on June 22, 1966.

As of that date, it was a liberal arts college, having a student body of about 600 women, whose program was "directed and unified by the Catholic philosophy of education" and with a religious program aimed at integrating the spiritual life of students with their social and academic activities.

The Administration consisted of a Board of Trustees and the Officers. All the Trustees were required to be, and were in fact, Dominican Sisters. The President, Secretary, Treasurer, Dean of the College and Dean of Students, were required to be, and in fact were, Dominican Sisters. The Librarian and Prioress were also Dominican Sisters. All members of the Order holding Administrative posts were assigned to the College by the Mother General of the Order in Columbus, Ohio, and could have been reassigned by the Mother General. The Honorary Chairman of the Advisory Board was traditionally the Archbishop of Hartford.

More than one-third of the faculty of approximately sixty were either Dominican Sisters or priests. Dominican faculty members were assigned to the College by the Order. Final authority to select faculty was exercised by the President, and application forms inquired as to the applicant's religion, although this question has now been pasted over. All faculty members—even non-Catholics—were expected to open classes with a prayer and the President herself testified that she did so. The constitution of the college forbade faculty members from disseminating views "subversive to the aims of the College as a Catholic institution."

The student body was estimated by the President as being 80 to 90 percent Catholic and virtually all newspapers and journals in which the College advertised were Catholic publications.

The College Parish Council, consisting of two students from each class, coordinated all religious affairs for students.

The College is a member of the National Catholic Educational Association and is affiliated with the Catholic University of America. Honor students were eligible for election to Kappa Gamma Pi, the national scholarship society for Catholic women's colleges. Fund raising letters referred to the college as a Catholic institution.

All Catholic students were required to take specified courses in Biblical Theology and Systematic Catholic Theology and to participate in an annual Retreat. The Constitution itself stated that the basis of the curriculum was "theology and scholastic philosophy intended to instill Catholic ideals." Four of the nine courses offered in Religious Studies were identifiable as Catholic in content.

The College maintained two separate chapels on Campus, both Roman Catholic, for use by the students, in addition to an offertory and altar in one of the residential halls. Confessions were held daily and Masses celebrated each noon and afternoon. The Rosary was recited daily in the dormitories as the "common evening prayer". The Catalogue listed such campus student units as The Confraternity of Christian Doctrine—providing opportunities for Catholic action and development of Catholic leadership, and the Third Order of St. Dominic—for association with the spiritual and apostolic work of the Dominican Order throughout the world. Special observances were noted of the feasts of our Blessed Mother and of the Dominican Saints, and Holidays observed by no classes include specifically Roman Catholic observances such as Feast of All Saints, Feast of St. Albert, Feast of Immaculate Conception, Feast of St. Thomas Aquinas and Ascension Thursday. The opening day of classes was marked officially by "Opening Mass of the Holy Spirit" which all students were

urged to attend. The official College Chaplain was a Catholic Priest and as of June, 1966 no non-Catholic cleric was listed in the Catalogue.

Most of the college buildings are named for Catholic religious personalities or concepts. Aquinas Hall, the new building in which the language laboratories are located, had a Cross on the exterior as well as a crucifix and a religious painting in the foyer. Rosary Hall which houses the College library and a student cafeteria, had a Cross on the external facade. Some classrooms contained crucifixes on the wall. Clerical members of the faculty customarily wore their religious garb when teaching classes.

3. *Fairfield University*

Fairfield University is an academic institution whose primary objective is the development of the creative intellectual potential of its students "in a context of religious commitment." This it does by providing *inter alia,* "an institutional Catholic Commitment as a way of life." It is a religiously committed University. It has a commitment to the basic beliefs of the Catholic Church, and it is concerned with preparing the student for a reasoned approach to his obligations as a Church member. Its general purposes are in large part derived from the traditional Jesuit approach to education shared with the other 28 Jesuit colleges in the United States. One of the Jesuit objectives is that teachers shall take a personal interest in students and know them individually.

Fairfield's ultimate governing authority is vested in a Corporation, which consists only of members of the Society of Jesus. They have a more than ordinary knowledge of its practices and actual happenings and a deep personal

concern for its outcomes. The Very Reverend William C. McInnis is president of the Corporation and the religious superior of Jesuits at Fairfield. Nearly all of the administration and staff are Jesuits or lay Catholics. The ratio of lay faculty to Jesuit is about two to one, but over 80% of faculty with tenure are either Jesuits or have received higher education at Catholic institutions, and the predominance of lay faculty were educated at Catholic institutions. While it subscribes to a 1940 Statement of Principles of Academic Freedom, faculty cannot undermine the basis of its Catholic commitment. No professor is expected to promote any doctrine in clear and direct violation of common Catholic teaching, and each recognizes by contract his liability to termination for any grave offense against Catholic doctrine or morality. Over 95% of undergraduates are Catholics.

In 1941 the Society of Jesus of New England purchased land in Fairfield to establish a college based on Christian faith and philosophy. In May 1945, Fairfield University of Saint Robert Bellarmine, Incorporated, was chartered, with its assets to go to the Society of Jesus or the bishop of the Roman Catholic diocese of Hartford in the event of dissolution. The Jesuits at Fairfield contribute services to it, on its financial statements, by means of entries calculating appropriate faculty salaries and deducting their maintenance costs.

In its Liberal Arts program, Fairfield emphasizes for all students a clear knowledge of ultimate religious, philosophical and moral values through systematic courses in philosophy and theology. It is a member of the Jesuit Educational Association, which *inter alia* furthers the aims of Catholic education and effectively presents the Catholic

philosophy of life. Its faculty is affiliated with several Jesuit and Catholic learned Societies.

Religion plays an important role in the program of this Jesuit college. Attitudes and values which may be communicated by the faculty both by word and example reflect the University's belief in a philosophy and theology based on Catholic principles. It believes that sound moral and ethical values are necessary contributions to the good of the person, State, and Church. To develop appropriate attitudes and values in its Catholic students, there is encouragement of attendance at mass, spiritual consultation, common prayer and annual retreats. Special efforts are made to provide a meaningful counseling dimension to the work of the Jesuit Fathers who are prefects in the dormitories.

Many classes begin and end with a prayer. Many classrooms contain religious symbols, as does the prominent facade of a major building. Many buildings bear the names of great Jesuits—mainly Saints. Several holyday holidays are observed. Above the University's name in the catalogue appears Ad Maioren Dei Gloriam—for the Greater Glory of God, a Jesuit motto. The seal with many religious indicia is prominent on the Catalogue, brochures, and the student handbook, where it is fully described.

Catholic students are required to take two basic and two elective courses in the Department of Theology. The two basic courses are entitled "The Scriptures as the Word of God" and "The Church of Christ as the People of God," and virtually all theology courses are described in terms of Catholic dogma, scripture, morality or liturgy. Theology instruction is central to the total objective of Catholic education, is to make the student aware that his faith is not merely a creed but a culture whose influence extends

throughout his life, and is designed to give him a more fully intelligent possession of Catholic truth and a keener vision of the Christian ideal of life. The Theology Department consists of seven Jesuits and two lay Catholic instructors.

There is a spiritual life committee of faculty and students designed to assist the growth of religious attitudes and values on campus. There are two extracurricular student spiritual groups, and in one, the Apostleship of Prayer, all Catholic students are encouraged to enroll and 80% of Fairfield's graduates are registered. There are other Catholic community and academic groups.

4. *Sacred Heart University*

The special act which defined the corporate powers of the university at the time of grant provided that the purpose of the corporation, *inter alia,* was to perform works of religion. A purpose of Sacred Heart University according to the catalog issued at the time of the grant was "Moral and spiritual growth through formal instruction, planned programs in practice and experience in worship." The source of the school's objectives is the philosophy of Catholic education in twentieth century America.

The Board of Trustees of the University is a self-perpetuating board. The institution was opened by five incorporators, who were James Kerr, Donald McGannon, Bishop Curtis, James Devine and John McGough. Of the five initial incorporators, three were members of the diocesan hierarchy. All of the incorporators were appointed by the Bishop of the Bridgeport diocese. The other two are not clerics but have been awarded the Knight of St. Gregory by the Bishop who bestows this award on promi-

nent Catholic laymen. The Bishop was the Chairman of the Board of Trustees.

Dr. William H. Conley, who has been the President of the Sacred Heart University since it opened in 1963, had taught at or administered or studied Catholic educational institutions for approximately 32 years at the time of the grant. The entire administration at the time of the grant was Roman Catholic.

The only full-time chaplain on the campus is a diocesan priest appointed by the Bishop who does no teaching. There is no Protestant chaplain now and the University has never had one. The school records concerning the faculty at the time of the grant showed only four that did not identify themselves as Catholic or Roman Catholic. Two of these four were recorded as Jewish, one Greek Orthodox and one left a blank in the space provided.

The only allowed evidence as to the religious orientation of the students is that the student body is currently about 80% Roman Catholic. The University seeks and obtains students by advertising in two Catholic publications, *America* and *Commonweal*. These advertisements are joint with eleven other "diocesan colleges". Certain members of the student body are members of religious orders or seminarians. Such students are ostensibly required to pay tuition but in fact are invariably given a scholarship covering all tuition fees.

The Special Act which incorporated the University provided that, in the event of dissolution of the corporation, all remaining assets should vest in the Bridgeport Roman Catholic Diocesan Corporation. The incorporators included the Bishop of the Bridgeport Diocese who was and is the Chairman of the Board of Directors.

The history of Sacred Heart shows that Bishop Curtis of the Bridgeport Diocese "directed" that the new diocesan college be lay operated and was "insistent" that the school be named "Sacred Heart". The University leased most of its land and only buildings not funded by the Federal Government from the Diocese of Bridgeport at an annual rental of one dollar for each of the first ten years. Later Sacred Heart University purchased land from the Diocese of Bridgeport on which to construct the library here involved in controversy. Sacred Heart University borrowed money on a note from the Diocese of Bridgeport to make the necessary changes in the high school laboratories in the main building, and to make its initial payment for books. The total obligation of Sacred Heart University to the Diocese in February 1967 is unknown; however, Sacred Heart University's obligation to the Diocese is $347,572. No interest is paid to the Diocese on this obligation.

The curriculum offered to the first group of Sacred Heart students in the fall of 1963 was one whose outlines were very similar to those which, more fully developed, were to appear later. The degree requirement was 131 credits of which 8 were required to be in Theology and 12 were required in philosophy. The catalog issued in February 1967 specified as required subjects: "Biblical Theology I: Old Testament"; "Biblical Theology II: New Testament"; "Systematic Theology I: Dogmatic Questions"; and "Systematic Theology II: Moral Questions". No comparable courses are required of every graduate at traditionally secular colleges.

At least some of the classrooms are still equipped with crucifixes and other religious objects on the walls which

have remained since the inception of the University. In each case they are readily removable but there has been no conscious effort to remove them from the classrooms. Each Sacred Heart teacher or librarian called by the defendants indicated there were crucifixes and/or fonts in their classrooms in February 1967. At the time of the grant by the Federal Government, the original library had crucifixes in various rooms which it then occupied. The librarian could not recall seeing comparable symbols at the University of Wisconsin which was the only non-church related college or university he had ever attended.

During the academic year in which the challenged grant was made, the University observed, by not holding classes, the following holy days in addition to Easter and Christmas: All Saints Day, Feast of the Immaculate Conception and Ascension Thursday and specified Thursday, September 7, and Friday, September 8, for a Freshman Retreat. Conversely, the University did hold classes on Monday, July 4, 1966, in accordance with a directive from the office of the Dean to Faculty Members.

Other spiritual opportunities offered are Stations of the Cross, Confessions, Bible Vigil, and the opportunity to deliver homilies. Father McDermott also offers daily Mass over WSHU-FM for shut-ins of the Diocese of Bridgeport.

Confessions are heard before Mass and at any time in the chaplain's office. Students give the Lenten Bible Vigils and participate in the various services offered daily. Voluntary closed retreats and days of recollection are arranged through the chaplain during the Spring semester of each academic year. The Musiturgy Club is engaged in promoting the desires of Vatican II with regard to the liturgical movement. Its purpose is to promote congregational singing in area churches.

Conversely, the University has never had a Protestant Chaplain or Chapel.

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No. 153

Vide No. 89 for Motion and Brief of Conn. State Conference of Branches of NAACP, et al.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 153

ELEANOR TAFT TILTON, ET AL., *Appellants,*

v.

ELLIOT L. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare, ET AL., *Appellees.*

No. 569

JOHN R. EARLEY, ET AL., *Appellants,*

v.

JOAN DICENSO, ET AL., *Appellees.*

No. 570

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, ET AL., *Appellants,*

v.

JOAN DICENSO, ET AL., *Appellees.*

MEMORANDUM IN OPPOSITION TO MOTIONS BY THE CENTER FOR LAW AND EDUCATION, ET AL., AND THE CONNECTICUT STATE CONFERENCE OF BRANCHES OF THE NAACP, ET AL., TO FILE BRIEFS AMICI CURIAE

Motions for leave to file briefs *amici curiae* in these cases have been submitted by two different sets of organizations and individuals—The Center for Law and Education, *et al.*, and the Connecticut State Conference of Branches of the NAACP, *et al.*[1] The appel-

[1] The brief submitted by the Center for Law and Education, *et al.* is addressed to Nos. 569 and 570, and not to No. 153. The brief submitted by the Connecticut State Conference of Branches of the NAACP, *et al.* is addressed to No. 153, as well as Nos. 569 and 570.

lants submit this Memorandum in Opposition to those motions on the sole ground that the briefs attached to both motions seek to inject into this case an issue of racial discrimination which was not presented in the pleadings, not reflected in any of the evidence presented in the trial courts and not considered by the District Courts in their dispositions of the cases.[2] Both briefs seek to attach indiscriminately the stigma of racially discriminatory practices to religiously affiliated schools which benefit from the educational assistance programs which are at issue in these cases. And both briefs urge the existence of those allegedly discriminatory practices as a basis upon which this Court should decide the appeals in these cases.

In effect, the movants are asking this Court to issue an advisory opinion on a set of hypothetical and highly speculative facts. Whether religiously affiliated schools should be constitutionally condemned for alleged racial imbalance in their student bodies presents serious and difficult questions of constitutional law. This Court has expressed extreme reluctance to deciding "important and difficult constitutional issues . . . devoid of factual context." *W. E. DuBois Clubs* v. *Clark,* 389 U.S. 309, 312 (1968). Because the so-called Equal Protection claims the movants wish to argue were not raised in the pleadings in the cases or illuminated by the evidence presented at the trials, the movants are inviting the Court to engage in constitutional adjudication in a context wholly inappropriate to such an exercise of judicial power.

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[2] The attorneys who have signed the brief on behalf of the Connecticut State Conference of Branches of the NAACP, *et al.* are acutely aware that no issue of racial discrimination exists in *Tilton* v. *Richardson,* No. 153, since they are attorneys of record for the plaintiffs in that action and they participated fully in the pre-trial discovery and the trial of that case.

Rule 40(5) requires that briefs be "free from burdensome, irrelevant, immaterial, and scandalous matter." That Rule also provides that "[b]riefs not complying with this paragraph may be disregarded and stricken by the court." The blanket charges of racial discrimination levied by the movants at all religiously affiliated schools quite clearly constitutes "scandalous matter." The effort of the movants to inject the racial discrimination issue into the cases at the present stage of their proceedings constitutes "irrelevant" and "immaterial" matter. The provisions of Rule 40(5) could properly be invoked by this Court to strike their briefs if their briefs were now properly before the Court. The principle embodied in that Rule should be invoked by the Court to deny the motion for leave to file briefs *amici curiae* by the Center for Law and Education, *et al.*, and the Connecticut State Conference of Branches of the NAACP, *et al.*

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 153

ELEANOR TAFT TILTON, et al
Appellants,

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ELLIOT L. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare, et al
Appellees.

ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

OBJECTIONS OF APPELLEE MARVIN K. PETERSON, CHAIRMAN OF THE COMMISSION ON AID TO HIGHER EDUCATION OF THE STATE OF CONNECTICUT, TO MOTION FOR LEAVE TO FILE BRIEF FOR CONNECTICUT STATE CONFERENCE OF BRANCHES OF THE NAACP, CONNECTICUT CIVIL LIBERTIES UNION, CONNECTICUT COUNCIL OF CHURCHES, CONNECTICUT JEWISH COMMUNITY RELATIONS COUNCIL, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, RITA JOHNSON, ROBERT S. EARLEY, DONALD L. WASSMAN, LAURA WILEY HANSEN, WILLIAM MANCHESTER AND EDGAR W. DAVIS, AMICI CURIAE.

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Appellee, Marvin K. Peterson, objects to the Motion for the following reasons:

1. The Motion is purported to be filed in conformance with Rule 42 of the Rules of the Supreme Court of the United States, but aside from the reference to the rule there has not been compliance with the requirement of said rule.

Pursuant to Rule 42(2) the brief of an amicus curiae in cases before the Court on the merits may be filed only after order of this Court and within the time allowed for the filing of the brief of the party supported. In the instant case, the brief of the appellants was filed on August 24, 1970. The purported amici curiae have filed Motion for Leave to File Brief Amici Curiae and Brief of Amici Curiae on February 5, 1971, more than five and one-half months late. This tardiness is inexcusable since counsel for the amici curiae were also counsel for the individual plaintiffs in the instant case.

This Court has very emphatically announced its attitude mandating compliance with procedural rules in the recent case of *Shapiro* v. *Doe*, 90 S. Ct. 421 (1970), in which it dismissed the appeal of the State of Connecticut because the appeal had been docketed two days beyond the time prescribed by Rule 13 of this Court.

2. The purported amici curiae are attempting to introduce into this case documentation that was never introduced into evidence at the trial of this case, but was introduced in another case which is not before this Court (*Johnson, et al* v. *Sanders, et al*, 319 F. Supp. 421); so that this Court is being placed in the novel position of being asked to admit new evidence into this case which the lower court did not have before it and did not consider in arriving at its decision on the merits. Certainly, this attempted procedure to introduce new evidence at the appellate level is unorthodox to say the least. The appellee herein can find no precedent for such procedure nor do the purported amici curiae cite any precedent.

3. The purported amici curiae appear to be attempting to have this Court decide that the United States District Court for the District of Connecticut erred when it ruled in the case of *Johnson, et al* v. *Sanders, et al*, supra, that the plaintiffs

therein had no standing to present a claim under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. We submit that this attempt is not only unorthodox but highly improper.

4. The Motion, as noted above, raises additional questions and issues which are not susceptible of resolution within the framework of this case. Rather than aiding the Court in its deliberation of the issues, we submit it would result in misleading and confusing the Court.

The Court should neither countenance nor condone such flagrant non-compliance with procedural requirements.

Accordingly, for any and all of the foregoing reasons and in the interest of orderly procedure, the Motion should be denied.

February 11, 1971

Respectfully submitted,

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Marvin K. Peterson, Chairman of
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IN THE

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OCTOBER TERM, 1970

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Appellants,

—v.—

ELLIOT L. RICHARDSON, Secretary of the United States, Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY and ALBERTUS MAGNUS COLLEGE,

Appellees.

ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 153

ELEANOR TAFT TILTON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RAISNER, ELISABETH R. SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANSHARD, JAY S. ROTH, CARL W. SCHAEFER, NORMAN T. DAVID, HERBERT T. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PENDLETON,

Appellants,

—v.—

ELLIOT L. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY and ALBERTUS MAGNUS COLLEGE,

Appellees.

ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

PETITION FOR REHEARING

Appellants respectfully present this petition for rehearing pursuant to Rule 58 of the Rules of this Court and set forth the following grounds in support thereof:

I. Grounds for Petition

In *Lemon* v. *Kurtzman*, No. 89, *Earley* v. *DiCenso*, No. 569 and *Sanders* v. *Johnson*, No. 1596, all but one member of this Court held in effect that a statute such as the one involved in this case would have been unconstitutional on its face had it involved elementary and secondary educational institutions rather than colleges and universities. In the present case, a majority of the Court (Justices Black, Douglas, Marshall, Brennan and White) are of the opinion that there is no constitutional difference between elementary and secondary schools on the one hand and colleges and universities on the other in respect at least to the Establishment Clause.[1] Nevertheless, the disposition of this appeal somehow results in a holding that the challenged statute is not unconstitutional on its face.

It is, however, not this anomalous disposition of this important controversy which is the basis of our petition for rehearing. (It will be the difficult responsibility of the United States Office of Education to pass upon applications for grants from sectarian colleges in the light of the holding or holdings in this case, and the Government might well be advised to join in this petition so that a rehearing could result in a needed clarification which would make its task easier.) Rather, our petition is based on the suggestion that the Court disposed of this case

[1] The suggestion at p. 12 of the plurality opinion that "college students are less impressionable and less susceptible to religious indoctrination" than elementary or secondary school students might well have relevancy to a challenge under the Free Exercise Clause but does not seem to have any where the contested issue is the applicability of the Establishment Clause.

in the capacity of a trial rather than appellate tribunal and did so on concessions not made, allegations not unchallenged and facts not found.

The Government took the position in the District Court that neither statutorily nor constitutionally was it relevant what a grantee college is (unless it is a divinity school), what it does, why it does it and how it does it, so long as the particular facility financed with Federal funds is not used for sectarian instruction or religious worship. The plaintiffs conceded that in none of the four colleges joined as defendants were the facilities financed with Federal funds used for sectarian instruction or religious worship—indeed, lacking the financial and investigative resources of the United States Office of Education and Department of Justice, a handful of citizen-taxpayers could hardly do otherwise. The District Court accepted in full the Government's position and on the basis thereof and on the plaintiffs' concession ruled in favor of both the Government and the defendant colleges without finding it necessary to pass upon the many contested factual issues.

It is not quite clear from the Government's brief to this Court whether it has abandoned the position taken by it in the District Court. But whether it has or has not, that position has not won the acceptance of any member of this Court; even Mr. Justice White, the only dissenter in *Lemon-Kurtzman*, agrees that if "any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith • • • the legislation would to that extent be unconstitutional." (Slip Opinion p. 11, footnote 2.)

But by rejecting both the Government's position and its acceptance by the District Court, this Court found itself without any findings of fact upon which it could dispose of the controversy in respect to the four defendant colleges except by acting as a trial court itself and making for itself the necessary factual findings. The plurality opinion justifies this on the ground that although "the District Court made no findings with respect to the religious character of the four institutions of higher learning, we are not required to accept the allegations as true under these circumstances, particularly where, as here, appellants themselves do not contend that these four institutions are 'sectarian.'"

We are frankly at a loss to understand this statement. Throughout these proceedings, including oral argument before this Court, we sought, apparently unsuccessfully, to make clear that we conceded nothing except that the Federally-financed facilities were not used for religious purposes. From the very beginning of this litigation and up to the present time we do in fact contend that the defendant institutions are "sectarian." In our main brief, for example, we noted (p. 35, footnote) that at least one of them, Albertus Magnus, was founded by Pattillo and Mackenzie, in their careful study Church-Sponsored Higher Education in the United States, to possess all six elements characteristic of sectarian colleges. We stated in our Reply Brief to this Court (at p. 5) that

> • • • to make our position clear, we state that while we not contend that any of the defendant colleges now fit the composite description we have set forth, neither do we concede that none of them substantially fitted the description when the grants to them

were approved by the Government. On the contrary, we believe that the District Court could well have found on the evidence before it that one or more of the defendant colleges did fit the description at that time.

We noted in our Reply Brief that most of the evidence presented by the four colleges to challenge our claim of sectarianism related to changes that took place *after* the grants to them were approved by the Government and even after this suit was commenced and in fact some that had not yet been made but were only planned or contemplated at the time of the trial.[2]

We pointed out often throughout this litigation, that our major thrust was at the action of the Government in approving grants to sectarian institutions, and alleged throughout that, unless enjoined, it would continue to approve grants to institutions such as the four college defendants were at the time the grants to them were approved. For that reason, we submit, the situation which existed at those times and not at the time of trial presented the critical constitutional issue in this litigation. But even if that is not so, even if constitutionality of the grants to the four colleges must be determined as of the time of trial, we submit nevertheless that there was enough evidence presented upon which a trial court could have found that each of them was sectarian within the purview of the plurality opinion and thus constitutionally barred from receiving the

[2] For example, the plurality opinion notes (on p. 13) that "some of the required theology courses at Albertus Magnus and Sacred Heart are taught by rabbis." But this was a quite recent development and was not the case when the grants to them were approved by the Government.

challenged grants. To support this assertion we set forth the following instances.

1. As we noted above, Mr. Justice White is of the opinion—as it may be assumed are all the other members of the Court—that a grant cannot constitutionally be made to an institution which restricts entry on religious grounds. Yet, appellee Annhurst College admits *inter alia* that even at the time of the trial 95 percent of its student body were Catholic, its Application for Admission asked for the religion not only of the applicant but also of her parents, its publications described it as a "Catholic liberal arts college for women" and stated that it is "conducted by the Daughters of the Holy Ghost," it suspended classes on Catholic holy days, had a Catholic chaplain and provided regular Catholic religious services on campus, but had no non-Catholic chaplain and provided no non-Catholic religious services on campus. (Brief of Appellee Colleges, pp. 18a-22a.) Could not a trial court have reasonably found on the basis of these concessions alone that Annhurst College does in fact restrict entry on religious grounds?

2. Mr. Justice White also agrees—and again it may be assumed that so do all the other Justices—that an institution would be constitutionally ineligible to receive grants if it "required all students gaining admission to receive instruction in the tenets of a particular faith." The appellee colleges concede that "Catholic students at the defendant [Fairfield] University are required to take two specified courses and two elective courses in the Theology Department." (Appellee Colleges' Brief, p. 4a.) At Albertus Magnus all Catholic students are required to take specified courses in Biblical Theology and Systematic Catholic The-

ology and to participate in an annual Retreat. Even if the small percentage of non-Catholics at these institutions, if there be any, are exempt from taking the required theology courses, we doubt that this would remove the taint of unconstitutionality from the grant.[3]

3. The plurality opinion acknowledges (at p. 8) that "appellants introduced several institutional documents which stated certain religious restrictions on what could be taught • • • ."[4] The opinion, however, adds that "other evidence showed that these restrictions were not in fact enforced • • • ." Assuming that neglect of enforcement may remove the taint of unconstitutionality from the grant, it remains true that the trial court did not find as a fact that the restrictions were not enforced or that the institutions' subscription to the 1940 Statement of Principles on Academic Freedom and Tenure was not treated as cavalierly as it is asserted the institutions' own documents were

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[3] The great Virginia Statute Establishing Religious Freedom provides in part:

"• • • even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labors for the instruction of mankind." (Quoted in *Everson* v. *Board of Education*, 380 U.S. 1, 44 (1947).)

[4] One of the documents states that a faculty member "is not free to disseminate doctrines and views that are subversive . . . of the aims and purposes of the College as a Catholic institution committed to the inculcation of Christian faith and morality." Appellee Colleges' Brief, p. 16a.

treated.[5] Moreover, most trial courts would probably give greater weight to documentary admissions against interest, particularly where the *ante litem motam* documents are still extant and have not been in any way officially rescinded or even modified, than to oral testimony that they are in fact not enforced. In any event, the proper forum for the resolution of a conflict between documentary and oral testimony is the trial court, at least in the first instance.

4. The plurality opinion states (at p. 3) that "religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities." No such finding of fact was made by the District Court as to any of the institutions. As we have just noted one of the institutions speaks of "the aims and purposes of the College as a Catholic institution committed to the inculcation of Christian faith and morality." The trial record is replete with similar statements in the catalogues and other documents of the institutions. We find it difficult to understand how this Court can make such a factual determination when the plaintiffs have consistently alleged and introduced evidence to the contrary and the trial court made no finding of fact respecting this strongly contested issue.

5. The plurality opinion states (at p. 13) that "[n]ot one of these four institutions requires its students to attend religious services." But the plaintiffs introduced evidence

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[5] Plaintiffs introduced into evidence at the trial depositions showing that while Fairfield University subscribed to the 1940 Statement, faculty could not undermine the basis of its Catholic commitment. No professor is expected to promote doctrine in clear and direct violation of Catholic teaching, and each recognizes by contract his liability to termination for any grave offense against Catholic doctrine or morality. Appellants' Reply Brief, p. 7a.

that in at least some of the institutions the Catholic students were required to attend religious retreats and the trial court made no factual finding to the contrary.

These instances and others in the plurality opinion and in the concurring opinion of Mr. Justice White show clearly that a majority of the Court have usurped the function of a trial court, reaching the following rather startling result. All of the Justices of the Court (the four Justices concurring in the plurality opinion, Mr. Justice White, and certainly the four dissenters) agree that:

(1) an institution which restricts admission on the basis of religion cannot constitutionally receive grants of tax-raised funds for the construction of facilities even if neither sectarian instruction nor religious worship takes place therein;

(2) the same is true in respect to an institution which requires its students to receive instruction in the tenets of a particular faith.

In addition, at least eight of the nine Justices agree that:

(3) an institution is constitutionally ineligible to receive a grant if it imposes religious restrictions on what can be taught; or

(4) has religious indoctrination as a substantial purpose or activity; or

(5) requires its students to attend religious services.

Appellants alleged and introduced evidence showing that all these factors were present in each of the four colleges joined as defendants in the suit. The trial court made no finding to the contrary. Nevertheless, a majority of this Court holds that each of the four colleges was constitution-

ally eligible to receive the grants made to it by the Government. The result, we suggest, is as anomalous as that presented in the first substantive paragraph of this petition.

II. Conclusion

For the reasons set forth herein, the appellants petition this Court for rehearing so that the remand of the case to the District Court shall direct it to formulate findings of fact on the controverted factual questions raised by the pleadings and evidence in the case.

Respectfully submitted,

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Certification Pursuant to Rule 58(1)

Leo Pfeffer certifies that he is a member of the bar of this Court and one of the attorneys in the within appeal, and that this petition is presented in good faith and not for delay.

LEO PFEFFER

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TILTON ET AL. *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

No. 153. Argued March 2–3, 1971—Decided June 28, 1971

The Higher Education Facilities Act of 1963 provides federal construction grants for college and university facilities, excluding "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . primarily in connection with any part of the program of a school or department of divinity." The United States retains a 20-year interest in any facility constructed with funds under the Act, and if, during this period, the recipient violates the statutory conditions, the Government is entitled to recovery of funds. Four church-related colleges and universities in Connecticut received federal construction grants for five facilities. Appellants attempted to show, in a three-judge court, that the recipient institutions were "sectarian" by introducing evidence of their relations with religious authorities, the curricula content, and other indicia of religious character. Appellee colleges introduced testimony that they had fully complied with the statutory conditions and that their religious affiliations did not interfere with their secular educational functions. The court held that the Act authorized grants to church-related schools, and sustained its constitutionality, finding that the Act had neither the purpose nor the effect of promoting religion. *Held:* The Act is constitutional except for that portion providing for a 20-year limitation on the religious use of the facilities constructed with federal funds. Pp. 3–——.

312 F. Supp. 1191, vacated and remanded.

THE CHIEF JUSTICE, joined by MR. JUSTICE HARLAN, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN, concluded that:

1. The Act includes colleges and universities with religious affiliations. Pp. 3–4.

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2. Congress' objective of providing more opportunity for college education is a legitimate secular goal entirely appropriate for governmental action. P. 5.

3. The record fully supports the District Court's findings that the colleges involved have not violated the statutory restrictions; it provides no basis for assuming that religiosity necessarily permeates the secular education of the colleges; and it yields no evidence that religion seeps into the use of any of the five facilities. Pp. 6–8.

4. The limitation of federal interest in the facilities to a period of 20 years violates the Religion Clauses of the First Amendment, as the unrestricted use of valuable property after 20 years is in effect a contribution to a religious body. Pp. 9–11.

5. This case is distinguished from *Lemon* v. *Kurtzman*, *ante*, p. —; (a) there is less danger here than in church-related primary and secondary schools dealing with impressionable children that religion will permeate the area of secular education, since religious indoctrination is not a substantial purpose or activity of these church-related colleges, (b) the facilities provided here are themselves religiously neutral, with correspondingly less need for government surveillance, and (c) the government aid here is a one-time, single-purpose construction grant, with only minimal need for inspection. Cumulatively, these factors lessen substantially the potential for divisive religious fragmentation in the political arena. Pp. 11–15.

6. The implementation of the Act does not inhibit the free exercise of religion in violation of the First Amendment. P. 15.

MR. JUSTICE WHITE concurred in the result in this case. P. 5.

MR. JUSTICE DOUGLAS, joined by MR. JUSTICE BLACK and MR. JUSTICE MARSHALL, concluded, with respect to the limitation of federal interest in the facilities to 20 years, that a reversion of a facility at the end of that period to a parochial school would be unconstitutional as a gift of taxpayers' funds and that in other respects also the federal act violates the Establishment Clause. Pp. 3–4.

BURGER, C. J., announced the Court's judgment and delivered an opinion in which HARLAN, STEWART, and BLACKMUN, JJ., joined. WHITE, J., filed an opinion concurring in the result, see No. 89, *Lemon* v. *Kurtzman*. DOUGLAS, J., filed a dissenting opinion, in which BLACK and MARSHALL, JJ., joined. BRENNAN, J., filed a dissenting opinion, see No. 89, *Lemon* v. *Kurtzman*.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 153.—October Term, 1970

Eleanor Taft Tilton et al., Appellants, v. Elliot L. Richardson, Secretary of the United States Department of Health, Education, and Welfare, et al.

On Appeal From the United States District Court for the District of Connecticut.

[June 28, 1971]

Mr. Chief Justice Burger announced the judgment of the Court and an opinion in which Mr. Justice Harlan, Mr. Justice Stewart, and Mr. Justice Blackmun join.

This appeal presents important constitutional questions as to federal aid for church-related colleges and universities under Title I of the Higher Education Facilities Act of 1963, 20 U. S. C. §§ 701–758, which provides construction grants for buildings and facilities used exclusively for secular educational purposes. We must determine first whether the Act authorizes aid to such church-related institutions, and if so, whether the Act violates either the Establishment or Free Exercise Clauses of the First Amendment.

I

The Higher Education Facilities Act was passed in 1963 in response to a strong nationwide demand for the expansion of college and university facilities to meet the sharply rising number of young people demanding higher education. The Act authorizes federal grants and loans to "institutions of higher education" for the

construction of a wide variety of "academic facilities." But § 751 (a)(2) expressly excludes

> "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . any facility which . . . is used or to be used primarily in connection with any part of the program of a school or department of divinity . . . ."

The Act is administered by the United States Commissioner of Education. He advises colleges and universities applying for funds that under the Act no part of the project may be used for sectarian instruction, religious worship, or the programs of a divinity school. The Commissioner requires applicants to provide assurances that these restrictions will be respected. The United States retains a 20-year interest in any facility constructed with Title I funds. If, during this period, the recipient violates the statutory conditions, the United States is entitled to recover an amount equal to the proportion of its present value which the federal grant bore to the original cost of the facility. During the 20-year period, the statutory restrictions are enforced by the Office of Education primarily by way of on-site inspections.

Appellants are citizens and taxpayers of the United States and residents of Connecticut. They brought this suit for injunctive relief against the officials who administer the Act. Four church-related colleges and universities in Connecticut receiving federal construction grants under Title I were also named as defendants. Federal funds were used for five projects at these four institutions: (1) a library building at Sacred Heart University; (2) a music, drama, and arts building at Annhurst College; (3) a science building at Fairfield University; (4) a library building at Fairfield; and (5) a language laboratory at Albertus Magnus College.

A three-judge federal court was convened under 28 U. S. C. § 2282 and § 2284. Appellants attempted to show that the four recipient institutions were "sectarian" by introducing evidence of their relations with religious authorities, the content of their curricula, and other indicia of their religious character. The sponsorship of these institutions by religious organizations is not disputed. Appellee colleges introduced testimony that they had fully compiled with the statutory conditions and that their religious affiliation in no way interfered with the performance of their secular educational functions. The District Court ruled that Title I authorized grants to church-related colleges and universities. It also sustained the constitutionality of the Act, finding that it had neither the purpose nor the effect of promoting religion. 312 F. Supp. 1191. We noted probable jurisdiction. 399 U. S. 904 (1970).

II

We are satisfied that Congress intended the Act to include all colleges and universities regardless of any affiliation with or sponsorship by a religious body. Congress defined "institutions of higher education," which are eligible to receive aid under the Act, in broad and inclusive terms. Certain institutions, for example, institutions which are neither public nor nonprofit, are expressly excluded, and the Act expressly prohibits use of the facilities for religious purposes. But the Act makes no reference to religious affiliation or nonaffiliation. Under these circumstances "institutions of higher education" must be taken to include church-related colleges and universities.

This interpretation is fully supported by the legislative history. Although there was extensive debate on the wisdom and constitutionality of aid to institutions affili-

ated with religious organizations, Congress clearly included them in the program. The sponsors of the Act so stated, 109 Cong. Rec. 19218 (1963) (remarks of Sen. Morse); *id.*, at 14954 (remarks of Rep. Powell); *id.*, at 14963 (remarks of Rep. Quie), and amendments aimed at the exclusion of church-related institutions were defeated. *Id.*, at 14990–14992, 19496.

III

Numerous cases considered by the Court have noted the internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause. *Walz* v. *Tax Commission*, 397 U. S. 664 (1970), is the most recent decision seeking to define the boundaries of the neutral area between these two provisions within which the legislature may legitimately act. There, as in other decisions, the Court treated the three main concerns against which the Establishment Clause sought to protect: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.*, at 668.

Every analysis must begin with the candid acknowledgment that there is no single constitutional caliper which can be used to measure the precise degree to which these three factors are present or absent. Instead, our analysis in this area must begin with a consideration of the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause.

There are always risks in treating criteria discussed by the Court from time to time as "tests" in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired. And, as we have noted in *Lemon* v. *Kurtzman*

and *Earley* v. *DiCenso*, decided today, candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication.

Against this background we consider four questions: First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion? Fourth, does the implementation of the Act inhibit the free exercise of religion?

(a)

The stated legislative purpose appears in the preamble where Congress found and declared that

> "the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education." 20 U. S. C. § 701.

This expresses a legitimate secular objective entirely appropriate for governmental action.

The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield* v. *Roberts*, 175 U. S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. Here the Act is challenged on the ground that its primary effect is to aid the religious purposes of church-related colleges and universities. Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their

various functions. But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld *Everson* v. *Board of Education*, 330 U. S. 1 (1947); *Board of Education* v. *Allen*, 392 U. S. 236 (1968); *Walz* v. *Tax Commission*, *supra*. See also *Bradfield* v. *Roberts*, *supra*. The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion.

A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional.

The Act itself was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions. It authorizes grants and loans only for academic facilities that will be used for defined secular purposes and expressly prohibits their use for religious instruction, training, or worship. These restrictions have been enforced in the Act's actual administration, and the record shows that some church-related institutions have been required to disgorge benefits for failure to obey them.

Finally, this record fully supports the findings of the District Court that none of the four church-related institutions in this case has violated the statutory restrictions. The institutions presented evidence that there had been no religious services or worship in the federally financed facilities, that there are no religious symbols or plaques in or on them, and that they had been used

solely for nonreligious purposes. On this record, therefore, these buildings are indistinguishable from a typical state university facility. Appellants presented no evidence to the contrary.

Appellants instead rely on the argument that government may not subsidize any activities of an institution of higher learning which in some of its programs teaches religious doctrines. This argument rests on *Everson* where the majority stated that the Establishment Clause barred any "tax . . . levied to support any religious . . . institutions . . . whatever form they may adopt to teach or practice religion." 330 U. S., at 16. In *Allen*, however, it was recognized that the Court had fashioned criteria under which an analysis of a statute's purpose and effect was determinative as to whether religion was being advanced by government action. 392 U. S., at 243; *Abington School District* v. *Schempp*, 374 U. S. 203, 222 (1963).

Under this concept appellants' position depends on the validity of the proposition that religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable. The argument that government grants would thus inevitably advance religion did not escape the notice of Congress. It was carefully and thoughtfully debated, 109 Cong. Rec. 19474–19475 (1963), but was found unpersuasive. It was also considered by this Court in *Allen*. There the Court refused to assume that religiosity in parochial elementary and secondary schools necessarily permeates the secular education that they provide.

This record, similarly, provides no basis for any such assumption here. Two of the five federally financed buildings involved in this case are libraries. The District Court found that no classes had been conducted in either of these facilities and that no restrictions were imposed by the institutions on the books that they acquired.

There is no evidence to the contrary. The third building was a language laboratory at Albertus Magnus College. The evidence showed that this facility was used solely to assist students with their pronunciation in modern foreign languages—a use which would seem peculiarly unrelated and unadaptable to religious indoctrination. Federal grants were also used to build a science building at Fairfield University and a music, drama, and arts building at Annhurst College.

There is no evidence that religion seeps into the use of any of these facilities. Indeed, the parties stipulated in the District Court that courses at these institutions are taught according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards. Although appellants introduced several institutional documents which stated certain religious restrictions on what could be taught, other evidence showed that these restrictions were not in fact enforced and that the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination. All four institutions, for example, subscribe to the 1940 Statement of Principles on Academic Freedom and Tenure endorsed by the American Association of University Professors and the Association of American Colleges.

Rather than focus on the four defendant colleges and universities involved in this case, however, appellants seek to shift our attention to a "composite profile" that they have constructed of the "typical sectarian" institution of higher education. We are told that such a "composite" institution imposes religious restrictions on admissions, requires attendance at religious activities, compels obedience to the doctrines and dogmas of the faith, requires instruction in theology and doctrine, and does everything it can to propagate a particular religion. Perhaps some church-related schools fit the pattern that

appellants describe. Indeed, some colleges have been declared ineligible for aid by the authorities that administer the Act. But appellants do not contend that these four institutions fall within this category. Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics. We cannot, however, strike down an Act of Congress on the basis of a hypothetical "profile."

(b)

Although we reject appellants' broad constitutional arguments we do perceive an aspect in which the statute's enforcement provisions are inadequate to ensure that the impact of the federal aid will not advance religion. If a recipient institution violates any of the statutory restrictions on the use of a federally financed facility, § 754 (b)(2) permits the Government to recover an amount equal to the proportion of the facility's present value which the federal grant bore to its original cost.

This remedy, however, is available to the Government only if the statutory conditions are violated "within twenty years after completion of construction." This 20-year period is termed by the statute as "the period of Federal interest" and reflects Congress' finding that after 20 years "the public benefit accruing to the United States" from the use of the federally financed facility "will equal or exceed in value" the amount of the federal grant. 20 U. S. C. § 754 (a).

Under § 754 (b)(2), therefore, a recipient institution's obligation not to use the facility for sectarian instruction or religious worship would appear to expire at the end of 20 years. We note, for example, that under § 718 (b)(6)(C), an institution applying for a federal grant is only required to provide assurances that the facility will not

be used for sectarian instruction or religious worship "during at least the period of the Federal interest therein (as defined in section 754 of this title)."

Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. Congress did not base the 20-year provision on any contrary conclusion. If, at the end of 20 years the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.

To this extent the Act therefore trespasses on the Religion Clauses. The restrictive obligations of a recipient institution under § 751 (a)(2) cannot, compatible with the Religion Clause, expire while the building has substantial value. This circumstance does not require us to invalidate the entire Act, however. "The cardinal principle of statutory construction is to save and not to destroy." *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30 (1937). In *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 234 (1932), the Court noted

> "The unconstitutionality of a part of an Act does not necessarily defeat . . . the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the valid part may be dropped if what is left is fully operative as a law."

Nor does the absence of an express severability provision in the Act dictate the demise of the entire statute. *E. g., United States* v. *Jackson*, 390 U. S. 570, 585 n. 27 (1968).

We have found nothing in the statute or its objectives intimating that Congress considered the 20-year provision essential to the statutory program as a whole. In view of the broad and important goals which Congress intended this legislation to serve, there is no basis for assuming that the Act would have failed of passage without this provision; nor will its excision impair either the operation or administration of the Act in any significant respect.[1]

IV

We next turn to the question of whether excessive entanglements characterize the relationship between government and church under the Act. *Walz* v. *Tax Commission, supra,* at 674–676. Our decisions today in *Lemon* v. *Kurtzman* and *Robinson* v. *DiCenso* have discussed and applied this independent measure of constitutionality under the Religion Clauses. There we concluded that excessive entanglements between government and religion were fostered by Pennsylvania and Rhode Island statutory programs under which state aid was provided to parochial elementary and secondary schools. Here, however, three factors substantially diminish the extent and the potential danger of the entanglement.

In *DiCenso* the District Court found that the parochial schools in Rhode Island were "an integral part of the religious mission of the Catholic Church." There, the record fully supported the conclusion that the inculcation of religious values was a substantial if not the dominant purpose of the institutions. The Pennsylvania case was decided on the pleadings, and hence we

[1] We note that the Commissioner of Education apparently includes no time limitation on the assurances that applicants are required to give with respect to the use of the facilities for sectarian instruction or religious worship. Compare § 3 (B)(3) with § (c) of part P of the Application Form, App., at 87.

accepted as true the allegations that the parochial schools in that State shared the same characteristics.

Appellants' complaint here contains similar allegations. But they were denied by the answers, and there was extensive evidence introduced on the subject. Although the District Court made no findings with respect to the religious character of the four institutions of higher learning, we are not required to accept the allegations as true under these circumstances, particularly where, as here, appellants themselves do not contend that these four institutions are "sectarian."

There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools.[2] The "affirmative, if not dominant, policy" of the instruction in pre-college church-schools is "to assure future adherents to a particular faith by having control of their total education at an early age." *Walz* v. *Tax Commission, supra,* at 671.[3] There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination.[4] Common observation would seem to support that view, and Congress may well have entertained it. The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Finally, many church-related colleges and universities seek to evoke free and critical

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[2] See Freund, Comment: Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1691 (1969).

[3] *E. g.*, J. Fichter, Parochial Schools: A Sociological Study 77–108 (1958); Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, 81 Harv. L. Rev. 513, 574 (1968).

[4] Giannella, *supra,* n. 1, at 583.

responses from their students and are characterized by a high degree of academic freedom.[5]

The record here would not support a conclusion that any of these four institutions departed from this general pattern. All four schools are governed by Catholic religious organizations, and the faculties and student bodies at each are predominantly Catholic. Nevertheless, the evidence shows that non-Catholics were admitted as students and given faculty appointments. Not one of these four institutions requires its students to attend religious services. Although all four schools require their students to take theology courses, the parties stipulated that these courses are taught according to the academic requirements of the subject matter and the teacher's concept of professional standards. The parties also stipulated that the courses covered a range of human religious experiences and are not limited to courses about the Roman Catholic religion. The schools introduced evidence that they made no attempt to indoctrinate students or to proselytize. Indeed, some of the required theology courses at Albertus Magnus and Sacred Heart are taught by rabbis. Finally, as we have noted, these four schools subscribe to a well-established set of principles of academic freedom, and nothing in this record shows that these principles are not in fact followed. In short, the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education.

Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activi-

[5] M. Pattillo & D. Mackenzie, Church-Sponsored Higher Education in the United States 217 (1966).

ties. Correspondingly the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened. Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal and indeed hardly more than the inspections that States impose over all private schools within the reach of compulsory education laws.

The entanglement between church and state is also lessened here by the nonideological character of the aid which the government provides. Our cases from *Everson* to *Allen* have permitted church-related schools to receive government aid in the form of secular, neutral, or nonideological services, facilities, or materials that are supplied to all students regardless of the affiliation of the school which they attend. In *Lemon* and *DiCenso*, however, the state programs subsidized teachers, either directly or indirectly. Since teachers are not necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction. There we found the resulting entanglement excessive. Here, on the other hand, the government provides facilities that are themselves religiously neutral. The risks of government aid to religion and the corresponding need for surveillance are therefore reduced.

Finally, government entanglements with religion are reduced by the circumstance that, unlike the direct and continuing payments under the Pennsylvania program, and all the incidents of regulation and surveillance, the government aid here is a one-time, single-purpose construction grant. There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact.

No one of these three factors standing alone is necessarily controlling; cumulatively all of them shape a narrow and limited relationship with government which involves fewer and less significant contacts than the two state schemes before us in *Lemon* and *DiCenso*. The relationship therefore has less potential for realizing the substantive evils against which the Religion Clauses were intended to protect.

We think that cumulatively these three factors also substantially lessen the potential for divisive religious fragmentation in the political arena. This conclusion is admittedly difficult to document, but neither have appellants pointed to any continuing religious aggravation on this matter in the political processes. Possibly this can be explained by the character and diversity of the recipient colleges and universities and the absence of any intimate continuing relationship or dependency between government and religiously affiliated institutions. The potential for divisiveness inherent in the essentially local problems of primary and secondary schools is significantly less with respect to a college or university whose student constituency is not local but diverse and widely dispersed.

V

Finally, we must consider whether the implementation of the Act inhibits the free exercise of religion in violation of the First Amendment. Appellants claim that the Free Exercise Clause is violated because they are compeled to pay taxes, the proceeds of which in part finance grants under the Act. Appellants, however, are unable to identify any coercion directed at the practice or exercise of their religious beliefs. *Board of Education* v. *Allen, supra,* at 248–249. Their share of the cost of the grants under the Act is not fundamentally distinguishable from the impact of the tax exemption sustained in *Walz* or the provision of textbooks upheld in *Allen*.

We conclude that the Act does not violate the Religion Clauses of the First Amendment except that part of § 754 (b)(2) providing a 20-year limitation on the religious use restrictions contained in § 751 (a)(2). We remand to the District Court with directions to enter a judgment consistent with this opinion.

Vacated and remanded.

SUPREME COURT OF THE UNITED STATES

No. 153.—October Term, 1970

Eleanor Taft Tilton et al., Appellants, *v.* Elliot L. Richardson, Secretary of the United States Department of Health, Education, and Welfare, et al.	On Appeal From the United States District Court for the District of Connecticut.

[June 28, 1971]

Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Marshall concur, dissenting.

The correct constitutional principle for this case was stated by President Kennedy in 1961 when questioned as to his policy respecting aid to private and parochial schools: [1]

> ". . . the Constitution clearly prohibits aid to the school, to parochial schools. I don't think there is any doubt of that.
>
> "The Everson case, which is probably the most celebrated case, provided only by a 5 to 4 decision was it possible for a local community to provide bus rides to nonpublic school children. But all through the majority and minority statements on that particular question there was a very clear prohibition against aid to the school direct. The Supreme Court made its decision in the Everson case by determining that the aid was to the child, not to the school. Aid to the school is—there isn't any room for debate on

[1] Public Papers of the Presidents 1961, pp. 142–143, Press Conference March 4, 1961.

that subject. It is prohibited by the Constitution, and the Supreme Court has made that very clear. And therefore there would be no possibility of our recommending it."

Taxpayer appellants brought this suit challenging the validity of certain expenditures, made by the Department of Health, Education, and Welware, for the construction of (1) a library at Sacred Heart College, (2) a music, drama, and arts building at Annhurst College, (3) a library and a science building at Fairfield College, and (4) a laboratory at Albertus Magnus College. The complaint alleged all of these institutions were controlled by religious orders and the Roman Catholic Diocese of Bridgeport, Conn., and that if the funds for construction were authorized by Title I of the Higher Education Facilities Act of 1963, 77 Stat. 363, 20 U. S. C. §§ 701–758, then that statute was unconstitutional because it violates the Establishment Clause. A three-judge District Court was convened and rejected appellants' claims.

Title I of the Higher Education Facilities Act of 1963 authorizes grants and loans up to 50% of the cost for the construction of undergraduate academic facilities in both public and private colleges and universities. A project is eligible if construction will result "in an urgently needed substantial expansion of the institution's student enrollment capacity, capacity to provide needed health care to students or personnel of the institution, or capacity to carry out extension and continuing education programs on the campus of such institution." 20 U. S. C. § 716. The Commissioner of Education is authorized to prescribe basic criteria and is instructed to "give special consideration to expansion of undergraduate enrollment capacity." 20 U. S. C. § 717.

Academic facilities are "structures suitable for use as classrooms, laboratories, libraries, and related facilities

necessary or appropriate for instruction of students, or for research programs. . . ." Specifically excluded are facilities "used or to be used for sectarian instruction or as a place of religious worship" or any facilities used "primarily in connection with any part of the program of a school or department of divinity." 20 U. S. C. § 751 (a). The United States retains a 20-year interest in the facilities and should a facility be used other than as an academic facility then the United States is entitled to recover an amount equal to the proportion of present value which the federal grant bore to the original cost of the facility. 20 U. S. C. § 754 (b). According to a stipulation entered below, during the 20 years the Office of Education attempts to insure that facilities are used in the manner required by the Act primarily by on-site inspections. At the end of the 20-year period the Federal interest in the facility ceases and the college may use it as it pleases. See 20 U. S. C. § 754 (a).

The public purpose in secular education is, to be sure, furthered by the program. Yet the sectarian purpose is aided by making the parochial school system viable. The purpose is to increase "student enrollment" and the students obviously aimed at are those of the particular faith now financed by taxpayers' money. Parochial schools are not beamed at agnostics, atheists, or those of a competing sect. The more sophisticated institutions may admit minorities; but the dominant religious character is not changed.

The reversion of the facility to the parochial school [2] at the end of 20 years is an outright grant, measurable by

[2] "It should be clear to all that a Roman Catholic parochial school is an integral part of that church, as definitely so as is the service of worship. A parochial school is usually developed in connection with a church. In many cases the church and school monies are not even separated. Such a school is in no sense a public school, even though some children from other groups may be admitted to it. The

the present discounted worth of the facility. A gift of taxpayers' funds in that amount would plainly be unconstitutional. The Court properly bars it even though disguised in the form of a reversionary interest. See *Lane* v. *Wilson*, 307 U. S. 208, 225.

But the invalidation of this one clause cannot cure the constitutional infirmities of the statute as a whole. The Federal Government is giving religious schools a block grant to build certain facilities. The fact that money is given once at the beginning of a program rather than apportioned annually as in *Lemon* and *DiCenso* is without constitutional signficance. The First Amendment bars establishment of a religon. And as I noted today in *Lemon* and *DiCenso*, this bar has been consistently interpreted from *Everson* v. *Board of Education*, 330 U. S. 1, 16, through *Torcaso* v. *Watkins*, 367 U. S. 488, 493 as meaning: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Thus it is hardly impressive that rather than giving a smaller amount of money annually over a large period of years, Congress instead gives a large amount all at once. The majority's distinction is in effect that small violations of the First Amendment over a period of years are unconstitutional (see *Lemon* and *DiCenso*) while a huge violation occurring only once is *de minimus*. I cannot agree within such sophistry.

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buildings are not owned and controlled by a community of American people, not even by a community of American Roman Catholic people. The title of ownership in a public school is vested in the local community, in the elected officers of the school board or the city council. But the title of ownership in a parochial school is vested in the bishop as an individual, who is appointed by, who is under the direct control of, and who reports to the pope in Rome." Boettner, Roman Catholicism, p. 375 (1970).

What I have said in *Lemon* and in the *DiCenso* cases decided today is relevant here. The facilities financed by taxpayers' funds are not to be used "for sectarian" purposes. Religious teaching and secular teaching are so enmeshed in parochial schools that only the strictest supervision and surveillance would insure compliance with the condition. Parochial schools may require religious exercises, even in the classroom. A parochial school operates on one budget. Money not spent for one purpose becomes available for other purposes. Thus the fact that there are no religious observances in federally financed facilities is not controlling because required religious observances will take place in other buildings. Our decision in *Engle* v. *Vitale*, 370 U. S. 421, held that a requirement of a prayer in public schools violated the Establishment Clause. Once these schools become federally funded they become bound by federal standards (*Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U. S. 275, 296; *Rosado* v. *Wyman*, 397 U. S. 397, 427 (concurring opinion); *Simkins* v. *Memorial Hosp.*, 323 F. 2d 959) and accordingly adherence to *Engle* would require an end to required religious exercises. That kind of surveillance and control will certainly be obnoxious to the church authorities and if done will radically change the character of the parochial school. Yet if that surveillance is not searching and continuous, this federal financing is obnoxious under the Establishment and Free Exercise Clauses all for the reasons stated in the companion cases.

In other words, surveillance creates an entanglement of government and religion which the First Amendment was designed to avoid. Yet after today's decision there will be a requirement of surveillance which will last for the useful life of the building and as we have previously noted, "[it] is hardly lack of due process for the Government to regulate that which it subsidizes." *Wickard*

v. *Filburn*, 317 U. S. 111, 131. The price of the subsidy under the Act is violation of the Free Exercise Clause. Could a course in the History of Methodism be taught in a federally financed building? Would a religiously slanted version of the Reformation or Quebec politics under Duplessis be permissible? How can the Government know what is taught in the federally financed building without a continuous auditing of classroom instruction? Yet both the Free Exercise Clause and academic freedom are violated when the Government agent must be present to determine whether the course content is satisfactory.

As I said in the *Lemon* and *DiCenso* cases, a parochial school is a unitary institution with subtle blending of sectarian and secular instruction. Thus the practices of religious schools are in no way affected by the minimal requirement that the government financed facility may not "be used for sectarian instruction or as a place of worship." Money saved from one item in the budget is free to be used elsewhere. By conducting religious services in another building, the school has—rent free—a building for nonsectarian use. This is not called Establishment simply because the government retains a continuing interest in the building for its useful life, even though the religious schools need never pay a cent for the use of the building.

Much is made of the need for public aid to church schools in light of their pressing fiscal problems. Dr. Eugene C. Blake of the Presbyterian Church, however, wrote in 1959: [3]

> "When one remembers that churches pay no inheritance tax (churches do not die), that churches may own and operate business and be exempt from the 52 percent corporate income tax, and that real

[3] *Tax Exemption and the Churches*, 3 Christianity Today No. 22, Aug. 3, 1959, p. 7.

property used for church purposes (which in some states are most generously construed) is tax exempt, it is not unreasonable to prophesy that with reasonably prudent management, the churches ought to be able to control the whole economy of the nation within the predictable future. That the growing wealth and property of the churches was partially responsible for revolutionary expropriations of church property in England in the sixteenth century, in France in the eighteenth century, in Italy in the nineteenth century, and in Mexico, Russia, Czechoslovakia and Hungary (to name a few examples) in the twentieth century, seems self-evident. A government with mounting tax problems cannot be expected to keep its hands off the wealth of a rich church forever. That such a revolution is always accompanied by anticlericalism and atheism should not be surprising."

The mounting wealth of the churches[4] makes ironic their incessant demands on the public treasury. I said in my dissent in *Walz* v. *Tax Commission*, 397 U. S. 644, 714:

"The religiously used real estate of the churches today constitutes a vast domain. See M. Larson &

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[4] Churches that owned an unrelated business enjoyed until recently a special tax advantage. Other charitable organizations were taxed on their "unrelated business income" derived from businesses regularly carried on by them. § 512 of the Int. Rev. Code of 1954. That tax was the normal tax and surtax. Thus in the case of income derived from corporations it was 22% on the first $25,000 and 48% on any additional income. § 11. Churches were exempted from this "unrelated business income" tax. § 511 (a)(2). Thus they paid no federal taxes on any of their revenues. Under the Tax Reform Act of 1969, 83 Stat. 487, the tax advantage for unrelated business income as respects all businesses owned by churches (prior to May 27, 1969) will be terminated after January 1, 1976. § 121 (a)(16). See H. Rep. No. 91–413 (Part I), 91st Cong., 1st Sess., pp. 46–47, 48; H. Rep. No. 91–782, 91st Cong., 2d Sess., p. 67.

C. Lowell, The Churches: Their Riches, Revenues, and Immunities (1969). Their assets total over $141 billion and their annual income at least $22 billion. *Id.*, at 232. And the extent to which they are feeding from the public trough in a variety of forms is alarming. *Id.*, c. 10." *Walz* v. *Tax Commission*, 397 U. S. 644, 714; Balk, The Religion Business (1968); 20 Church and State 8 (1967).

It is almost unbelievable that we have made the radical departure from Madison's Remonstrance [5] memorialized in today's decision.

I dissent not because of any lack of respect for parochial schools but out of a feeling of despair that the respect which through history has been accorded the First Amendment is this day lost.

It should be remembered that in this case we deal with federal grants and with the command that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The million-dollar grants sustained today put Madison's miserable "three pence" to shame. But he even thought, as I do, that even a small amount coming out of the pocket of taxpayers and going into the coffers of a church was not in keeping with our constitutional ideal.

I would reverse the judgment below.

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[5] The Remonstrance is reproduced in appendices to the opinion of Rutledge, J., in *Everson*, 330 U. S., at 63, and to that of Douglas, J., in *Walz* v. *Tax Commission*, 397 U. S., at 719.